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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RAY WILL,

Petitioner,

—v.—

MICHIGAN DEPARTMENT OF STATE POLICE and DIRECTOR OF STATE POLICE,

Respondents.

ON WRIT OF *CERTIORARI* TO THE MICHIGAN SUPREME COURT

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether a state or its officers, acting in their official capacities, are "persons" subject to suit in state court under 42 U.S.C. § 1983?

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BRIEF OF PETITIONER

PARTIES

The petitioner in this Court is Ray Will, who was the plaintiff in the proceedings below. Respondents are the Michigan Department of State Police and the Director of Michigan Department of State Police. The Michigan Department of Civil Service and the State Personnel Director were dismissed as defendants by the trial court (*see* p. 12a of Appendix to Petition of Certiorari), but continued to be carried on the caption of the case in the Michigan Court of Appeals and Michigan Supreme Court below.

OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported *sub nom. Smith v. Department of Public Health, Will v. Department of Civil Service*, 428 Mich. 540, 410 N.W.2d 749 (1987), and is reprinted in the Appendix to the Petition for Certiorari at 1a.

The opinion of the Michigan Court of Appeals is reported *sub nom. Will v. Department of Civil Service*, 145 Mich. App. 214, 377 N.W.2d 826 (1985) and is reprinted in the Appendix to Petition for Certiorari at 124a.

JURISDICTION

The jurisdiction of this Court to review the opinion and judgment of the Michigan Supreme Court is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTES INVOLVED

This case involves 42 U.S.C. § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In 1950, the Michigan legislature passed a statute premised on a legislative declaration "that the governments of the United States and of this and other states of the United States are threatened by attempts to overthrow existing government by

force and violence." Michigan Public Act 38 of 1950 (Extra Session), Section 1 (Appendix to this Brief at 1a).[1] To accomplish the express statutory purpose "to maintain, preserve and strengthen our established form of government," *id.*, the Michigan legislature declared a wide range of advocacy activities to be felonies and imposed the following duty on the state department of police: "The state police *shall* collect information and evidence relating in any manner to activities prohibited by this act." *Id.*, Section 3(c), Br.App. 3a (emphasis added). A companion piece of legislation gave the Commissioner of State Police authority to accomplish this mandate:

> The commissioner of the Michigan state police is authorized to establish within the department of the Michigan state police a division to be known as the subversive activities investigation division . . . .
>
> The duties of the subversive activities investigation division shall be to investigate activities within the state that are subversive of state or federal government [and] to obtain and compile information concerning such activities . . . .
>
> The commissioner shall have power to maintain in the subversive activities investigation division confidential files of information on activities that are subversive of government . . . [and] the commissioner may furnish information contained therein . . . to the responsible heads of any agency having charge of employment by the state . . . .
>
> The term "subversive activities" as used in this act shall be construed to mean and include criminal syndicalism as it relates to political reform only . . . .

Michigan Public Act 40 of 1950 (Extra Session), Sections 1, 2, 3(a), and 5. Br.App. 7a. This companion legislation specifically

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1 Hereafter, the following abbreviations will be used to refer to the Appendices: J.A. will refer to pages in the Joint Appendix, Br. App. will refer to pages in the Appendix to this Brief, and Pet. App. will refer to pages in the Appendix to the Petition for Writ of Certiorari.

incorporated the definition of "criminal syndicalism" used in a 1931 Michigan statute, *see* Michigan Public Act 328 of 1931, which stated: "[C]riminal syndicalism is hereby defined as the doctrine which advocates crime, sabotage, violence or other unlawful methods of terrorism as a means of accomplishing industrial or political reform. The advocacy of such doctrine, whether by word of mouth or writing, is a felony." Br. App. 8a.[2]

Pursuant to these and other Michigan statutes, the Michigan state police department for 25 years operated a "special investigations unit"—widely known as the "Red Squad"—which carried on surveillance of a wide variety of political activist organizations, including civil rights and anti-war groups. In 1976, judgments were issued in two separate state court actions against the Michigan Department of State Police, declaring these statutes "unconstitutional on their face in violation of the Michigan and United States Constitution" and ordering the state police to disband its special investigations unit. Br. App. 10a-11a and 12a-13a. As part of the ancillary relief, the state police were directed to release their confidential surveillance files to the individuals who were the subject of those files.

This case arises from that successful vindication of the United States Constitution in the courts of Michigan. Petitioner never engaged in any political activity that would gain him the attention of the "Red Squad." He is a computer analyst and an exemplary state employee since 1969. However, the "Red Squad" maintained a file on petitioner's brother, Charles, who was a student activist during the 1960s in the anti-war movement at Michigan State University.

In the latter half of 1973, petitioner sought opportunities to advance to data systems analyst 11; one of these opportunities arose within the Michigan Department of State Police. Petitioner ranked number two on the promotional register and the

2 Another section of this 1931 statute provided that "any person who shall display a red flag in any public assembly, parade or demonstration in this state is guilty of a felony." Michigan Public Act 328 of 1931. Br. App. 9a.

number one candidate withdrew. Nevertheless, petitioner was not promoted. The reason petitioner did not get the position—unknown to him at the time—was that the state police found that it had a "Red Squad" file on petitioner's student activist brother, Charles. Duly recorded in Charles Will's file was the notation: "Subject's brother Ray Eugene DOB 2-27-44 made application for employment with MSP. Personnel advised 8-9-73." Petitioner knew nothing of this until 1977, when his brother Charles obtained his "Red Squad" file pursuant to the state court orders discussed above. Pet. App. 11a.

When petitioner learned that he had been denied the position because of the "Red Squad's" secret file on his brother Charles, he filed lawsuits against the respondents in the Circuit Court of Ingham County (a court of general jurisdiction) and the Michigan Court of Claims (a court possessing jurisdiction over claims against the state of Michigan), claiming violations of his rights under the Michigan and federal constitutions and relying for the latter claims on 42 U.S.C. § 1983.[3]

The cases were consolidated for trial. Pet. App. 11a-13a. In 1982, after a bench trial consisting of an agreed record and a damages hearing, Judge Thomas L. Brown rendered decision on petitioner's § 1983 claim for both the Ingham County Circuit Court and the Michigan Court of Claims.[4] He determined that the state of Michigan was the real party in interest and that the respondents Michigan Department of State Police and its director, sued in his official capacity, were "persons" within

3 The Court of Claims was created by the Michigan legislature to exercise exclusive jurisdiction over claims against the state of Michigan, its departments and agencies. Br. App. 17a. An individual may not be sued in the Court of Claims except in his or her official capacity as a state official.

4 At the time of this litigation the general jurisdiction court for the county where the state capital is located, the Ingham County Circuit Court, served a dual function as the Court of Claims. Thus, the trial judge, Thomas L. Brown, wore two "hats" in this case: as a circuit court judge and as a judge of the Court of Claims. Judge Brown was also one of the two state court judges who had declared the Acts of 1950 unconstitutional, and so was fully familiar with the operations of the "Red Squad."

the meaning of § 1983. Pet. App. 14a. On the merits, the trial judge determined that "denial of [petitioner's] promotion based on [his] brother's political persuasion violates due process." Pet. App. 13a. Judge Brown awarded petitioner $584.64 for lost wages, $40,544 for career loss, $56,052 for emotional distress, and $56,052 in exemplary damages. Pet. App. 126a. Respondents did not appeal to the Michigan Supreme Court from the determination that they were liable on the merits of petitioner's § 1983 claim for violating his due process rights, and that determination is not in contention here.

The Michigan Court of Appeals held that the Court of Claims properly exercised jurisdiction over the § 1983 claim. In particular, the Court of Appeals interpreted Section 6440 of the Court of Claims Act, which states: "No claimant may be permitted to file claim in said court . . . who has an adequate remedy upon his claim in the federal courts." Michigan Court Laws 600.6440. The court construed this provision as specifically conferring jurisdiction on the Court of Claims to entertain § 1983 claims that would be barred in federal court by the Eleventh Amendment, such as claims against the state and its officers in their official capacity. Pet. App. 127a-129a. The court thus made clear that petitioner could not have brought a Court of Claims action against the Director of State Police except in his official capacity.[5]

The Michigan Court of Appeals nonetheless reversed the Court of Claims as to the statutory construction of § 1983. Relying on *Quern v. Jordan*, 440 U.S. 332 (1979), it concluded that the state is not a "person" within the meaning of § 1983. Pet. App. 131a-132a. This determination conflicted with the decisions of two other panels of the Michigan Court of Appeals, which had held that the state and its agencies are "persons" under § 1983. *See Smith v. Michigan*, 122 Mich. App. 340, 333 N.W.2d 50 (1983) and *Karchefske v. Dept. of Mental Health*, 143 Mich. App. 1, 371 N.W.2d 876 (1985). *See also Hampton v. Michigan*, 144 Mich. App. 794, 799-800, 377 N.W.2d 920 (1985) (state is not a "person"). Because of the conflict, the

5 The Michigan Supreme Court expressly affirmed these holdings. Pet. App. 10a.

Michigan Supreme Court granted leave to appeal and consolidated the *Will* and *Smith* cases for argument.

On the consolidated appeal, the Michigan Supreme Court decided, by a 4-2 vote, that the state and its officials were not "persons" for purposes of § 1983. The Michigan Supreme Court based its decision on this Court's holding in *Quern v. Jordan*, *supra*, concluding that the fact that § 1983 did not abrogate the states' Eleventh Amendment immunity "was tantamount to deciding" that a state is not a "person" under § 1983. Pet. App. 36a-37a. The court also relied in its decision on an independent analysis of the "historical circumstances surrounding the enactment of § 1983." Pet. App. 43a.

A different 4-2 majority of the Michigan Supreme Court determined in *Smith* that neither sovereign nor statutory governmental immunity applied to constitutional violations. It was necessary to reach that issue in *Smith* because the Michigan Supreme Court decided that there was an implied right of action for violation of the Michigan constitution. Pet. App. 9a. The positive rulings on the state constitutional claim and sovereign immunity issues, however, were of no assistance to petitioner. Though his complaint had originally set forth state constitutional claims along with the § 1983 claims on which he prevailed in the trial court, the Michigan Supreme Court held that he had waived his right to assert any state constitutional claims by failing to preserve them for appeal. Pet. App. 98a. As a result, the Michigan Supreme Court's negative determination on whether a state is a "person" under § 1983 removed all possibility of relief for respondents' unconstitutional actions.

Justices Archer and Levin dissented, noting that § 1983 was enacted to enforce the provisions of the Fourteenth Amendment, which were directed against the states. Their opinion also cites several state and federal cases holding that states are "persons" under § 1983. *See* Pet. App. 117a-120a.

SUMMARY OF ARGUMENT

The question in this case is whether states, their agencies and officers acting in official capacity are "persons" for purposes of damage actions under 42 U.S.C. § 1983. Petitioner readily concedes that the Eleventh Amendment bars such suits in federal courts under most circumstances. However, the fundamental error of the court below was that it confused the broad remedial scope of § 1983 with the Eleventh Amendment's limits on federal jurisdiction. Whether § 1983 authorizes a cause of action against state defendants, in the absence of an Eleventh Amendment immunity, must be decided by normal rules of statutory construction. Applying those rules, it is clear that the court below erred.

First, the legislative history of § 1983 demonstrates clearly that the 42d Congress—whatever its intent to abrogate the states' Eleventh Amendment immunity—intended to authorize civil actions against all state actors who violated federal rights, and thereby to provide a statutory remedy coextensive with the protections of the Fourteenth Amendment.

Second, this Court's decision in *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978), supports a holding that states are "persons" under § 1983. Consistent with that view, this Court has frequently assumed or confirmed in dictum that § 1983 provides a remedy against all state defendants. Moreover, this Court has clearly held that state officers may be sued in their official capacities for prospective *injunctive* relief, refusing to bifurcate the statutory term "person" on the basis of relief sought. At a minimum, therefore, state officers such as the respondent Director of the Michigan Department of State Police come within the scope of § 1983.

Third, a holding that § 1983 provides a cause of action against state defendants, thus making some state defendants suable in state court under § 1983 but not in federal court, is fully consistent with principles of federalism. State courts have historically heard federal claims barred in federal courts. It also in no way impairs the states' Eleventh Amendment immunity

from suit in federal court, since the "person" question is governed by a different standard than the question of Eleventh Amendment abrogation.

Finally, even assuming *arguendo* that the term "person" should be construed in light of Eleventh Amendment considerations, the Michigan Supreme Court erred in concluding that the 42d Congress would have thought that the Eleventh Amendment applied to § 1983 and other federal question cases despite the fact that *Hans v. Louisiana*, 134 U.S. 1 (1890), was not decided until 20 years after § 1983's enactment.

ARGUMENT

I.

THE LEGISLATIVE HISTORY OF § 1983 DEMONSTRATES THAT THE 42D CONGRESS INTENDED TO CREATE A CAUSE OF ACTION AGAINST STATES, THEIR AGENCIES AND OFFICERS ACTING IN THEIR OFFICIAL CAPACITIES

This Court has regularly turned to the legislative history of § 1983 for assistance in construing its terms. *See e.g.*, *Monell v. New York City Dep't of Social Services*, *supra*; *Monroe v. Pape*, 365 U.S. 167 (1961). The meaning of the term "person" acting "under color of" state law is thus a matter of ordinary statutory construction where, as here, Eleventh Amendment considerations are absent, *see* Part IIA, *infra*. The legislative history of § 1983 clearly demonstrates that Congress intended to provide civil remedies against *all* state actors who transgressed the Fourteenth Amendment rights of citizens—whether states themselves, their agencies, or officers acting in their official capacities.

A. The 42d Congress intended that the remedies in § 1983 be coextensive with the rights secured by the Fourteenth Amendment, which it understood as operating directly upon the states

Section 1983 is derived from § 1 of the Civil Rights Act of 1871, 17 Stat. 13, ch 22 (1871) ("the Act"). The Act was the fourth of a series of civil rights laws passed by the Reconstruction Congress, beginning with the Civil Rights Act of 1866, 14 Stat. 27, ch 31 (1866), and followed by the [Civil Rights] Enforcement Act of 1870, 16 Stat. 140, ch 114 (1870), and the [Civil Rights] Enforcement Act of 1871, 16 Stat. 433, ch 99 (1871). Section 1 of the Act created a civil cause of action for violation of civil rights which paralleled a penal provision first enacted as Section 2 of the 1866 Act and reenacted as Section 17 of the 1870 Act. Thus, § 1 of the Act should be read as an extension of pre-existing principles of general civil rights enforcement against state actors, in contrast to the other sections of the Act, particularly § 2 (now 42 U.S.C. § 1985), which were addressed to a specific problem which preoccupied the 1871 Congress: the private violent rampage being conducted against Reconstruction by the Ku Klux Klan (KKK) both in and outside of state and local government.

On March 28, 1871, Representative Shellabarger introduced H.R. 320, entitled "A Bill to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for Other Purposes" ("the Bill"). Section 1 of the Bill passed both Houses without amendment or substantial opposition and became § 1 of the Act. After going to two Conference Committees, the amended Bill was approved by both Houses on April 19, 1871 and became law the next day. (A more detailed summary of the Act's legislative history appears *infra*, Br. App. 29a.) In § 1, Congress created a complete remedy for violations of the Fourteenth Amendment by giving to the citizen whose rights were violated the right to bring "*any* action at law, suit in equity or other proper proceeding for redress [against] . . . *any* person" acting "under color of" state law who was responsible for the violation.[6]

As would be expected, the legislative history to the Act is replete with references to the Fourteenth Amendment. Congress was aware that a first draft of the Fourteenth Amendment—which merely granted power to Congress to pass legislation to secure rights to citizens in the states—was withdrawn in favor of one that granted rights directly to citizens, prohibited states from violating those rights, and granted to Congress the power to enforce those rights against the states. *See generally* Cong. Globe Appendix, 42d Cong., 1st Sess., 150-151 (1871) (Rep. Garfield) [hereafter "Globe" or "Globe App."]. The revolutionary character of the Fourteenth Amendment was thus the creation of duties that ran from sovereign states to their own citizens as a matter of federal law. Representative Garfield emphasized this fact in his speech in support of the 1871 Bill. In contrast to the rejected version of the Fourteenth Amendment he observed that

> [t]he one [enacted] exerts its force *directly upon the States*, laying restrictions and limitations upon their power and enabling Congress to enforce these limitations.

Globe App. 150 (emphasis added).[7] Representative Shellabarger, the author of the Bill, its manager in the House, and a

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6 The 1874 recodification of § 1 replaced "any person" with "every person" and changed "any action at law" to the current "an action at law."

7 This Court has noted this feature of the Fourteenth Amendment as well, noting that its prohibitions

> are directed to the States . . . . They have reference to actions of the political body denominated a State by whatever instruments or in whatever modes that action may be taken.

Ex parte Virginia, 100 U.S. 339, 346-347 (1880). *See also Virginia v. Rives*, 100 U.S. 313, 318 (1880) and *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453-456 (1976). It was the "abrogation and denial of rights, *for which the States alone were or could be responsible*, [that] was the great seminal and fundamental wrong which was intended to be remedied [by the Fourteenth Amendment]." The *Civil Rights Cases*, 109 U.S. 3, 9 (1883) (emphasis added).

member of the House Select Committee looking into the need for such legislation, explained the Bill to the House by emphasizing this same point:

> [W]here is the doubt Congress may, by appropriate legislation, protect those rights of American citizenship so solicitously and so abundantly guarded and made eternal as the Constitution itself? If, after all this transcendent profusion of enactment *in restraint of the States* and affirmative conferment of power on Congress, the *States still remained unrestrained*, . . . to make laws, abridging or not abridging, to protect or to destroy, by banded murder, these United States citizens *as the State may please*, and the United States must stand by a powerless spectator of the overthrow of the rights and liberties of its own citizens, then not only is the profusion of guards put by the fourteenth amendment around our rights a miserable waste of words, but the Government is itself a miserable sham, its citizenship a curse, and the Union not fit to be.

Globe App. 69 (1871) (emphasis added). Thus, Representative Shellabarger argued that affirmative legislation was needed to give the individual citizens a statutory cause of action to enforce rights created by the Fourteenth Amendment:

> [W]here personal rights were invaded *by the States* . . . Congress has never hesitated to provide the necessary affirmative legislation to enforce the personal rights which the Constitution guaranties, as between persons in the State *and the State itself*.

Globe App. 70 (emphasis added).[8]

These ideas were repeated by the Senate manager of the Bill, Senator Edmunds. He began with the same premise as Shellabarger: Section 1 was "so very simple" because it was "really reenacting the Constitution." Globe 569. The Bill was necessary to protect citizens "in the rights that the Constitution gave them . . . against any assault *by any State* or under any State or *through the neglect of any State* . . . ." Globe 697. The potential for violation of these newly granted constitutional rights demanded a complete statutory remedy:

> There is nothing in a violation of law, there is nothing in the default of public duty, unless it is to be followed by punishment or recompense, or both. That is all there is to it.

Globe 757.

The intent to enforce the Fourteenth Amendment by providing a full remedy against the states is also evident in the speech made in support of the Bill by Representative Bingham, the author of § 1 of the Fourteenth Amendment. After declaring the Bill's purpose to be "the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic . . . *to the extent of the rights guarantied to him by the Constitution*," Globe App. 81, he continued:

> The powers of the States have been limited and the power of Congress extended by the last three amendments of the Constitution. These last amendments—thirteen, fourteen, and fifteen—do, in my judgment, vest in Congress a power to *protect the rights of citizens against States*, and individuals in States, never before granted.

Globe App. 83 (emphasis added). He went on:

> Why not in advance provide against *the denial of rights by States*, whether the denial be acts of omission or commission, as well as against the unlawful acts of combinations and conspiracies against the rights of the people? *The States* never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws . . . .
>
> *[T]he States* did deny to citizens the equal protection of the laws, *they* did deny the rights of citizens under the Constitution, and except to the extent of the express limitations

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8 Congress' intent in the Fourteenth Amendment and its enforcing legislation to elevate individual rights over the historical primacy of state sovereignty is further illustrated by Rep. Bingham's closing statement (to applause) in his speech supporting the 1871 Bill: "The citizen . . . has a higher destiny than that of the States." Globe App. 86.

> upon the States, as I have shown, the citizen has no remedy. . . . *They* took property without compensation, and he had no remedy. *They* restricted the freedom of the press, and he had no remedy. *They* restricted the freedom of speech, and he had no remedy. *They* restricted the rights of conscience, and he had no remedy. Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against *all such abuses and denials of right as these in States and by States*, or combinations of persons?

Globe App. 85 (emphasis added).[9]

Representative Bingham consistently referred to the Bill (when it was first introduced in the House) as enforcing rights "against either States or unlawful combinations of men." Globe App. 82, 83, 85. It is clear that the phrase "against . . . States" was a reference to § 1 because of the Bill's content. At that time, the Bill contained only four substantive sections.[10] Since the second, third and fourth provided various remedies for violations by "unlawful combinations of men," such as the KKK, Bingham could only have been referring to § 1 when he referred to enforcement of rights "against . . . States."

On the Senate side, Senator Trumbull maintained that Congress was empowered by the Fourteenth Amendment to "correct" violations of its provisions and to "*prevent any state* from depriving any person" of the rights therein. Globe 577 (emphasis added). He elaborated:

> Whenever the rights that are conferred by the Constitution of the United States on the Federal Government *are infringed upon by the States, we should afford a remedy*. . . . I am ready to pass appropriate legislation on that subject; and I understand that this bill as it passed the House of Representatives *was framed on this principle*.

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9 *See* Globe App. at 153 (comments of Rep. Garfield); Globe at 367-368 (comments of Rep. Sheldon); Globe 475-477 (comments of Rep. Dawes).

10 The fifth section was a saving provision for previously enacted civil rights statutes.

Globe 578-579 (emphasis added). In words directly parallel to those of Representative Bingham, Senator Boreman viewed the Bill as necessary to avoid "the merest mockery" of

> say[ing] that the citizens of any portion of this country had guarantied to them by our Constitution certain rights, and at the same time to say that there was no power in this Government to secure to them those rights, to carry out the guarantee, to enable them to enforce those rights. . . . [The goal is] to provide the machinery in order that the injured person may secure his rights.

Globe App. 229. *See also* Globe 650 (comments of Sen. Sumner).

Opponents of the Bill were clearly aware of the impact of the Bill on states. For example, Representative Arthur complained that the Bill:

> reaches out and draws within the despotic circle of central power *all the domestic, internal, and local institutions and offices of the States, and then asserts over them* an arbitrary and paramount control as of the rights, privileges, and immunities secured and protected, in a peculiar sense, by the United States in the citizens thereof.

Globe 365 (emphasis added). *See also* Globe App. 217 (comments of Sen. Thurman).

In response, the Bill's supporters did not seek to minimize the impact of the proposed legislation on the states. The Bill's supporters stated that opponents correctly understood the Bill's provisions but that Congress had the power under the Fourteenth Amendment to reach the states themselves:

> If any one thinks it is going too far to give the United States this national supervisory power to protect the fundamental rights of citizens of the United States, I do not agree with him. It is not wise to permit our devotion to the reserved rights of the States to be carried so far as to deprive the citizen of his privileges and immunities. We must remember that it was State rights, perverted I admit from

> their true significance, that arrayed themselves against the nation and threatened its existence. We must remember that it was for the very purpose of placing in the General Government a check upon this arrogance of some of the States that the fourteenth amendment was adopted by the people. We must remember that, *if the legislation we propose does trench upon what have been, before the fourteenth amendment, considered the rights of the States, it is in behalf and for the protection of immunities and privileges clearly given by the Constitution*; and that Federal laws and Federal rights must be protected whether domestic laws of their administration are interfered with or not, because the Constitution and the law made in pursuance thereof are the supreme law of the land.

Globe 502 (comments of Sen. Frelinghuysen) (emphasis added).

The consistent theme throughout the debates, then, was that § 1 was intended to provide a remedy coextensive with the rights secured against the states by the Fourteenth Amendment, and that § 5 of the Fourteenth Amendment was a sufficient constitutional basis for imposing such liability. As this Court observed in *Monell*, "there can be no doubt that § 1 of the Civil Rights Act was intended to provide *a remedy, to be broadly construed, against all forms of official violation* of federally protected rights." 436 U.S. at 700-701 (emphasis added).[11]

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11 Justice Stewart explained in *Mitchum v. Foster*, 407 U.S. 225 (1972), how § 1983 was "a product of a vast transformation" in this country's concepts of federalism:

> Section 1983 was . . . enacted for the express purpose of 'enforc-[ing] the provisions of the Fourteenth Amendment' . . . and was thus an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment. As a result of the new structure of law that emerged in the post-Civil War era—and especially of the amendment which was its centerpiece—the role of the federal government as a guarantor of basic federal rights against state power was clearly established.

Id. at 242.

B. Because Congress considered a state to be a corporation, it understood that remedies against state officers implicated the state

It is clear that Congress considered states to be legal persons in terms of the traditional relationship between corporations and their officers and fully recognized that states, as corporations, could act only through their agents. As Senator Edmunds, the manager of the Bill, explained:

> *A State is a corporation*; it exists only, in contemplation of law, as an organized thing; and it is manifested, represented entirely, and fully in respect to every one of its functions, by that department of its government on which the execution of those functions is respectively devolved. Therefore, if it is the duty of the executive and judicial departments of a State to enforce a law and they do not enforce it, the State does not enforce it. If it is their duty not to enforce a law and they do enforce it, it is the State that enforces it.

Globe 696 (emphasis added). The opponents of the 1871 Act accepted and used the same corporate terminology in arguing that the liability created by the Act was an unwarranted attack on state sovereignty. *See e.g.*, Globe at 661 ("What is a State? Is it not a body politic and corporate? . . . A State can act how? Only through its departments"); *id.* at 662 ("A State can act only through its organization; it is a body corporate and politic") (comments of Sen. Vickers).

As Senator Edmunds pointed out, if, as in this case, state officers enforce an unconstitutional state law, "it is the State that enforces it." Just as the duties of the state are imposed on state officers, likewise remedies which are imposed on state officers are imposed directly on the state, as explained Representative Burchard:

> What more appropriate legislation for enforcing a constitutional prohibition upon a State than to compel State officers to observe it? *Its violation by the State can only be consummated through the officers by whom it acts* . . . .

Globe App. 314 (emphasis added).

Congress deliberately adopted the terminology of corporate law in describing the states so as to make clear that actions by state officers were state actions and that state violations of the Fourteenth Amendment could be remedied by suing state officers. Because each state was a corporate body ("a body politic and corporate"), application of § 1983 to its officers necessarily implicated the state itself. Thus, the legislative history makes it clear that, in subjecting officers to suit under § 1983—which no one doubts Congress did—it understood that it was effectively authorizing claims against the state.[12]

C. The Sherman Amendment debates demonstrate that the supporters of Section 1 assumed Congress could impose liability for money damages against state officers

When the Bill reached the Senate, Senator Sherman added an amendment that would have imposed vicarious liability on each resident of a county, city or parish where mob violence such as that perpetrated by the KKK took place. *See Monell*, 436 U.S. at 702 (Appendix to Opinion of the Court). The House rejected this amendment and the 1st Conference Report substituted a provision for the Sherman Amendment (hereafter "the modified Sherman Amendment") which shifted liability for money damages from the residents personally to the local governmental unit. *Id.* at 703-704. As explained in *Monell*, the key debates on the modified Sherman Amendment were not between the Republicans and Democrats, but rather between the radical Republican supporters and the score of moderate House Republicans who opposed the provision and spelled its defeat.

12 The Dictionary Act, passed two months before § 1983 was enacted, provided that "the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such word[ ] w[as] to be used in a more limited sense." Act of February 25, 1871, § 2, 16 Stat. 431. That language was subsequently modified. *See* Rev. U.S. Stats. § 1 (1874), 1 U.S.C. § 1, and *Monroe*, 365 U.S. at 190 n.47. Nevertheless, this Court in *Monell* used the Dictionary Act to supplement the abundant evidence in the legislative history of § 1983 to show that the phrase "any person" was to be given a broad interpretation to effectuate the sweeping remedial purposes of the Act. *See* 436 U.S. at 683, 688-89.

The Republicans, moderate and radical alike, considered it self-evident that the Fourteenth Amendment gave Congress the power to subject states and their officers to liability for damages. Relying on this assumption, proponents of the modified Sherman Amendment structured their argument in the form of the following simple syllogism:

> MAJOR PREMISE: Congress has the power under the Fourteenth Amendment to impose liability for damages on states and their agents for failure to provide equal protection of the law.
>
> MINOR PREMISE: Counties and cities are agents of the state.
>
> CONCLUSION: Therefore Congress has the power under the Fourteenth Amendment to impose liability for damages on counties and cities for failure to provide equal protection of the law.

In explaining the modified Sherman Amendment, Senator Edmunds, as the Senate conference manager, used this syllogistic argument, saying that it was "perfectly conclusive":

> *[T]he Constitution declares that it shall be the duty of the State* to give to everybody the equal and complete protection of its laws; and *where, therefore, there is a State organism*, as a county, which is intrusted with the local administration of justice . . . then this clause in the Constitution *which speaks of the protection which the States must afford* to all their inhabitants equally under the law, to preserve them against riots and tumults, *does speak . . . to the municipal authorities* existing under the State law directly; *and when, therefore, they fail to perform the duty of protection*, which the theory of this law implies that they are bound to perform, against tumult and riot, *then the Constitution has declared that Congress, by ap-*

> *propriate legislation, may apply to them the duty of making reimbursement.*

Globe 756 (emphasis added). Representative Shellabarger, the House Conference manager, relied on the same logic in presenting the modified Sherman Amendment. In response to the question whether "it is competent for the United States to inflict liabilities and resulting taxes upon a municipal corporation," he replied:

> [This] is, in its legal significance, the same question we have heard before in these and other Halls, "Can the United States coerce a State?" Today it is, "Can the United States coerce a county of a State, touching a subject-matter over which the United States has power . . . ."

Globe 751. The Republican supporters of the modified Sherman Amendment felt confident in characterizing liability against counties as a species of liability against states precisely because they assumed that the Fourteenth Amendment supported their major premise that Congress could impose liability on states directly.

What is more important than the supporters' views, however, is that the moderate Republican *opponents* of the modified Sherman Amendment (who prevailed in the House) accepted the same major premise of state liability, while denying the minor premise that municipalities were the same as states. The remarks of Representative Willard illustrate this:

> [T]he Constitution has not imposed . . . any duty upon a county, city, parish, or any other subdivision of a State, to enforce the laws, to provide protection for the people, to give them equal rights, privileges, and immunities. The Constitution has declared that to be the duty of the *State*. . . . The city and the county have no power except the power that is given them by the State . . . . We should never impose an obligation upon a community when we do not and cannot give that community the power to discharge that obligation . . . .

> I hold that this duty of protection, if it rests anywhere, rests on the *State*, and that if there is to be any liability visited upon anybody for a failure to perform that duty, such liability should be brought home to the State. Hence, in my judgment, *this section would be liable to very much less objection, both in regard to its justice and its constitutionality, if it provided that if in any State the offenses named in this section were committed, suit might be brought against the State, judgment obtained, and payment of the judgment might be enforced upon the treasury of the State.*

Globe 791 (emphasis added). Representative Poland made the same point:

> As I understand the theory of our Constitution, the national Government deals *either with States or with individual persons*. . . . With these local subdivisions we have nothing to do. We can impose no duty upon them; we can impose no liability upon them in any manner whatever.

Globe 793 (emphasis added). *See also* Globe 795 (comments of Rep. Burchard).

Thus, the moderate Republican opposition to the modified Sherman Amendment rested their arguments on the same major premise underlying those of the proponents: that Congress could clearly impose liability for money damages on a state through its officers for violation of the Fourteenth Amendment. The Republican opponents parted company with the proponents only as to the next step in the syllogism that equated local units of government with the state where the violation involved failure to provide law enforcement.

This Court's exhaustive review of the Sherman Amendment debates in *Monell* supports this reading of the legislative history:

> [O]pponents [of the Sherman Amendment] argued that municipalities were not generally charged by the States with keeping the peace and hence did not have police forces, so that the duty to afford protection ought not to

> devolve on the municipality, *but on whatever agency of state government was charged by the State with keeping the peace.*

Id. at 670 n.21 (emphasis added). Though there was doubt as to the power of Congress to "dictate the manner in which a State fulfilled its obligations of protection," because it was "a matter of state discretion whether it delegated the peacekeeping power to a municipal or county corporation, to a sheriff, etc.," *id.* at 673 n.30, there was *no doubt* "that the Federal Government could impose on the *States* the obligation imposed by the Sherman Amendment . . . ." *Id.* (emphasis by the Court).[13]

II.

THIS COURT'S DECISIONS SUPPORT THE CONCLUSION THAT STATES AND STATE OFFICERS ARE "PERSONS" UNDER § 1983 WHERE, AS HERE, ELEVENTH AMENDMENT CONSIDERATIONS ARE ABSENT

The issue of who is a "person" acting "under color of" state law within the meaning of § 1983 is decided according to normal rules of statutory construction. *See* Part IIIB, *infra*. That inquiry is separate and distinct from whether Congress has abrogated the states' Eleventh Amendment immunity to suit in federal court.

13 Some *Democratic* opponents *did* argue against the modified Sherman Amendment by rejecting the major premise. However, the Republicans viewed those Democratic arguments as mooted by the passage of the Fourteenth Amendment. *See e.g.*, Globe 774 (comments of Sen. Morton); Globe 800 (comments of Rep. Perry). Moreover, as *Monell* teaches, the relevant legislative history of the Sherman Amendment must be found in the comments of the House moderate Republicans who voted *for* § 1 of the Act rather than the Democrats, who uniformly voted on party lines *against* every section of the Bill, including § 1, all three versions of the Sherman Amendment, and the Second Conference substitute which was enacted with the support of the House moderate Republicans. 436 U.S. at 673, 676.

A. *Monell*'s construction of the term "person" and its reasoning support the conclusion that states and their agencies and officers come within the scope of the § 1983 cause of action

In *Monell v. New York Dep't of Social Services*, *supra*, this Court concluded that municipalities and their officers acting in their official capacity are "persons" under § 1983. Despite the fact that the *Monell* construction of the term "person" was necessarily limited to the municipality situation presented there, it supports the conclusion that states, and their agencies and officers acting in their official capacity, should be included within the definition of "person."

First, *Monell* construed the reach of the word "person" in a way that allows states to be included in it. The Court observed that "[a]n examination of the debate on § 1 and application of appropriate rules of construction show unequivocally that § 1 was intended to cover *legal as well as natural persons*." *Id.* at 683 (emphasis added). Further, because "there is nothing in the 'context' of [§ 1983] calling for a restricted interpretation of the word 'person', the language of that section should prima facie be construed to include '*bodies politic*' among the entities that could be sued." 436 U.S. at 689 n.53 (emphasis added). Finally, *Monell* observed that "there can be no doubt that § 1 of the Civil Rights Act was intended to provide a remedy, to be broadly construed, against *all forms of official violation* of federally protected rights." *Id.* at 700 (emphasis added).

Second, *Monell* articulated a statutory construction test that is equally applicable here. As the *Monell* Court observed,

> *absent a clear statement* in the legislative history supporting the conclusion that § [1983] was *not to apply* to the official acts of a municipal corporation—which is simply not present—*there is no justification for excluding* municipalities from the "persons" covered by § [1983].

Id. at 701 (emphasis added). This is the identical presumption used by this Court to include states within generic classes of defendants in other federal statutes. For example, in determining that the state of Alabama was a "common carrier by railroad"

covered by the Federal Employers' Liability Act, this Court declined to hold,

> *in the absence of express provision to the contrary*, that [Congress] intended to exclude a particular group of [railroad] workers from the benefits conferred by the Act.

Parden v. Terminal Railway of Alabama, 377 U.S. 184, 190 (1964) (emphasis added). *See also Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 282 (1959) (state is "employer" covered by Jones Act); *California v. Taylor*, 353 U.S. 553 (1957) (Railway Labor Act includes states); *United States v. California*, 297 U.S. 175 (1936) (Federal Safety Appliance Act applies to states).[14]

In the present case, as in *Monell*, there is *no* "clear statement" in the legislative history that states were *not* intended to be sued under § 1983, and, consistent with the *Parden/Petty* line of cases, it would be wrong to presume that Congress "intended to exclude a particular group of" victims of unconstitutional state action from the benefits of § 1983's civil remedies. In fact, as demonstrated in Part I, *supra*, there is abundant evidence that Congress affirmatively intended that states come within the scope of the civil remedies authorized by § 1983.

Third, the reasoning of *Monell* for including municipalities within the definiton of "person" applies equally to states. The *Monell* Court found significant the fact that "municipalities through their official acts could, equally with natural persons, create the harms intended to be remedied by [§ 1983]." *Id.* at 685-86. Because state power and resources far exceed those of any municipality or individual officer, states through their official acts enjoy an even *greater* capacity than either municipalities or natural persons to create the harms intended to be

14 To the extent that *Parden* or *Petty* holds that mere inclusion of states within the class of suable defendants is sufficient to abrogate the Eleventh Amendment, they are apparently overruled according to the plurality opinion in *Welch v. Texas Dep't of Highways*, 483 U.S. ____, 107 S.Ct. 2941 (1987). However, they are still good law for determining when a federal statute states a cause of action against states, as the plurality in *Welch* itself makes clear. *See id.* at 2947 nn.6 & 7 and at 2957 (White, J., concurring). *See also* Part IIIA, *infra*.

remedied by § 1983. Indeed, since the harms that Congress had in mind were violations of the Fourteenth Amendment—that is, harms resulting from violation of the injunction that "[n]o *State* shall make or enforce any law" transgressing the rights secured therein—states are the most logical defendants under § 1983.

B. This Court has repeatedly assumed that states, state agencies, and state officers acting in their official capacities are "persons" suable under § 1983

Perhaps the most obvious evidence of this Court's assumption that a § 1983 cause of action can be made out against a state is found in the Eleventh Amendment "waiver" doctrine under which states may consent to being sued for damages in federal court. The waiver doctrine has been developed almost entirely in § 1983 cases on the clear assumption that the state *was* fully subject to suit under § 1983 if the Eleventh Amendment was not applicable. For example, in *Edelman v. Jordan*, 415 U.S. 651 (1974), the extended debate between the majority and the dissent over waiver was meaningful only if the § 1983 claim was otherwise proper.[15] Moreover, in all the § 1983 cases in this Court involving allegations that a state had waived its Eleventh Amendment immunity, this Court has never suggested that, were immunity in fact waived, the case would nonetheless have to be dismissed for failure to make out a cause of action. This Court's statement in *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985), is typical: "Unless a State has waived its Eleventh Amendment immunity . . . , a State cannot be sued directly in its own name regardless of the relief sought." *See also Alabama v. Pugh*, 438 U.S. 781, 782 (1978) and *Quern v. Jordan*, 440 U.S. at 339-40. The clear import of such a statement is

15 The "person" issue would have been considered jurisdictional in *Edelman* and thus could have been raised by the Court on its own motion, as the Court in fact did the year before in *Kenosha v. Bruno*, 412 U.S. 507, 511-12 (1973) (treating the "person" issue as one of subject matter jurisdiction because the same wording is used in 28 U.S.C. § 1343(3), the only basis for jurisdiction without regard to amount in controversy in the federal courts at the time).

that, but for the lack of consent, the suit would otherwise be proper.

In *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), this Court observed that a state agency created by compact with another state was suable under § 1983: "[i]f the respondents have enacted unconstitutional legislation there is no reason why *relief against [the agency] itself* [under § 1983] should not adequately vindicate petitioners' interests." *Id.* at 405 n.29 (emphasis added). Because of the land use regulation functions that the agency served and its limited geographical jurisdiction, this Court held that it was not entitled to Eleventh Amendment immunity. 440 U.S. at 400-02. However, an interstate compact agency has traditionally been assumed to be a state agency by this Court. *See Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. at 279. Consequently, like states that waive their Eleventh Amendment protections, interstate compact agencies, though generally considered a part of the contracting state, are nonetheless suable "persons" under § 1983 if there is no Eleventh Amendment problem.

This Court has also decided several cases where a state was sued by name in state court under § 1983 and has never raised any question of the propriety of those suits. In *Maine v. Thiboutot*, 448 U.S. 1 (1980), the state of Maine was sued for welfare benefits and in *Martinez v. California*, 444 U.S. 277 (1980), the state of California was sued for damages allegedly caused by its parole board's release of a prisoner. In both cases, several aspects of § 1983 law—including the propriety of bringing such actions in state court—were discussed without anyone doubting the existence of a cause of action against the state. *See Martinez*, 444 U.S. at 283 n.7 and *Maine*, 448 U.S. at 3 n.1 (indicating that state courts have concurrent jurisdiction over § 1983 claims). Further, as discussed in Part III, *infra*, this Court has repeatedly referred to the availability of a § 1983 damages remedy against states in state court in its Eleventh Amendment decisions.

This Court's attorney fee decisions are also consistent with the assumption that states are "persons." This Court has allowed awards of attorney fees under 42 U.S.C. § 1988 directly against a state department of corrections, *see Hutto v. Finney*, 437 U.S. 678 (1978), against a judge in her official capacity, *Pulliam v. Allen*, 466 U.S. 522, 543-544 (1984), and against a state itself. *Maine v. Thiboutot*, *supra*. Moreover, this Court has clearly recognized that "fee liability runs with merits liability" and, consequently, that a § 1983 fee award is possible only

> when a State in a § 1983 action has been prevailed against for relief on the merits, *either because the State was a proper party defendant or because state officials were sued in their official capacity* . . . .

Kentucky v. Graham, 473 U.S. at 168. *See also id.* at 164.[16]

Because "liability on the merits and responsibility for fees go hand in hand," *id.* at 165, the cases approving fee awards against states and state officers support the proposition that the scope of the § 1983 cause of action should reach them as well. In *Monell*, this Court relied for its holding in part on § 1988, which it viewed as a "recent expression[ ] of congressional intent" that was "inconsistent" with *Monroe*'s conclusion that municipalities were not "persons." 436 U.S. at 696. As noted in *Monell*, it is clear from the legislative history of § 1988 that Congress intended that fees would be "collected from the official, *in his official capacity*, from funds of his agency or under his control, or *from the State or local government (whether or not the agency or government is a named party).*" *Id.* at 699, quoting Senate Report No. 94-1011 at 5 (1976) (emphasis by the Court).

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16 Even setting aside the awards in *Hutto* and *Pulliam* as official capacity suits for *injunctive* relief (*but see* Part IIB, *infra*), *Maine v. Thiboutot* was a § 1983 action brought against the state of Maine in state court in which the state was directed "to pay the correct amounts retroactively" to certain individuals who had been denied welfare benefits. 448 U.S. at 3.

C. State officers in their official capacities are "persons" suable under § 1983 regardless of the nature of relief sought

In the present case, petitioner sued both the Michigan Department of State Police and the Director of State Police in his official capacity. This Court has held that "official capacity suits represent only another way of pleading an action against an entity of which an officer is an agent—at least where Eleventh Amendment considerations do not control analysis . . . ," *Monell*, 436 U.S. at 691 n.55, and that "a judgment against a public servant 'in his official capacity' imposes a liability on the entity he represents." *Brandon v. Holt*, 469 U.S. 464, 471 (1985); *accord Kentucky v. Graham*, 473 U.S. at 166. Like *Monell*, the present case is one in which "Eleventh Amendment considerations do not control analysis." Thus, if petitioner properly brought his claims against the respondent Director, petitioner should prevail.

The federal courts have had little opportunity to decide whether a *damages* claim against an officer in his official capacity comes within the terms of § 1983. Such claims are invariably barred by the Eleventh Amendment, absent waiver. *See e.g.*, *Edelman v. Jordan*, 415 U.S. at 651. However, unlike § 1983 suits against states, which are barred by the Eleventh Amendment regardless of the relief sought, *Alabama v. Pugh*, *supra*, § 1983 suits against state officers for prospective *injunctive* relief have been allowed for years even though the relief effectively runs against the state. As this Court stated in *Hutto v. Finney*, 437 U.S. at 690, under *Ex parte Young*, 209 U.S. 123 (1908), "federal courts [can] enjoin state officials in their official capacities."[17] Indeed, because claims for injunctive relief against a state officer seek to compel or restrain the officer in

17 § 1983 suits brought under the *Young* fiction against officials who then resign or die have always been subject to the free substitution rule in Fed. R. Civ. P. 25, rather than continuing the former official in the caption or substituting his estate. For example, the *Jordan* litigation, of which *Edelman v. Jordan* and *Quern v. Jordan* were a part, witnessed the succession of Messrs. Weaver, Swank, Trainor, Edelman and Quern.

the use of the powers held by virtue of his or her office, the officer *must* be sued in his or her official capacity.[18]

There is no reason to believe that Congress intended state officers to be regarded as "persons" under § 1983 for some purposes but not others. A similarly strained reading of § 1983 was rejected in *Kenosha v. Bruno*, 412 U.S. 507 (1973), where this Court observed:

> nothing in the legislative history . . . or in the language actually used by Congress . . . suggest[s] that the generic word "person" in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought.

412 U.S. at 513.[19]

The majority opinion in *Monell* demonstrated how unlikely it would have been that the 42d Congress intended to exclude official capacity officer suits from the purview of § 1983 by noting that the legislative history explicitly discussed state takings of property without just compensation as an example of the type of case that could be brought under § 1983:

18 Under Michigan law, claims for both injunctive relief and damages must be alleged against the state officer in his or her official capacity. Michigan Court Rule 2.201(C)(3) states: "An officer of the state or governmental unit must be sued in the officer's official capacity to enforce the performance of an official duty."

19 Though *Kenosha v. Bruno* was overruled by *Monell*, the Court in *Monell* specifically approved the quoted language as reflecting the proper approach to the "person" definition. 436 U.S. at 701 n.66. In the face of the plain wording of the statute, no other rule of construction would be possible. In § 1 of the 1871 Act, Congress expressly authorized "*any action at law, suit in equity, or other proper proceeding for redress*" to be brought against "any person . . . [acting] under color of" state law in violation of the plaintiff's federal rights. Moreover, in *Monell*, this Court declined to use the *Young* fiction to interpret the meaning of "person" in § 1983, despite the fact that the court of appeals below had suggested that approach. In his concurring opinion, Justice Powell explained the illogic of "import[ing], by analogy, the Eleventh Amendment fiction of *Ex parte Young* into § 1983," noting that to do so "would create tension with *Kenosha*." *See* 436 U.S. at 712.

> Given this purpose, it beggars reason to suppose that Congress would have exempted municipalities from suit, insisting instead that compensation for a taking come from an officer in his individual capacity rather than from the government unit that had the benefit of the property taken.

436 U.S. at 687. This is especially true where a state officer is acting pursuant to an unconstitutional state law for the benefit of the entity that employs the officer (the situation in this case). As Justice Powell observed in his concurrence in *Monell*:

> The Court correctly rejects a view of the legislative history that would produce the anomalous result of immunizing local government units from monetary liability for action directly causing a constitutional deprivation, even though such actions may be fully consistent with, and thus not remediable under, state law. No conduct of government comes more clearly within the "under color of" state law language of § 1983. It is most unlikely that Congress intended public officials acting under the command or the specific authorization of the government employer to be *exclusively* liable for resulting constitutional injury.

436 U.S. at 707 (emphasis by Justice Powell).

Justice Powell's concurrence in *Monell* also suggests another approach to the official capacity suit question: that the appropriate focus is not merely the term "person," but rather the phrase "person . . . [acting] under color of [state] law." Taking this approach, there is ample evidence to indicate that this phrase, at a minimum, was intended to subject state officers to civil liability in their official capacities.

This Court has recognized from the beginning of modern § 1983 law in *Monroe* that, whatever other uses § 1983 might have to impose individual liability on "rogue" state officers whose actions in violation of federal rights also violate state law, § 1983 was primarily intended to be a means of gaining redress for just that situation mentioned by Justice Powell: "action directly causing a constitutional deprivation, even though such actions may be fully consistent with, and thus not

remediable under, state law." This is based in part on the fact that it was the invalidation of certain state laws enforced by officers acting in their official capacities pursuant to those state laws that § 1983 was primarily intended to reach. *See* Zagrans, *"Under Color of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 Va. L. Rev. 499 (1985). Thus, in *Monroe* there was sharp disagreement whether acts *in violation of* state law were "under color of state law" for § 1983 purposes, but all agreed that action taken *pursuant to* state law came within the definition. *See* 365 U.S. at 237 (Frankfurter, J., dissenting). *See generally id.* at 211-58; *see also* Zagrans, 71 Va. L. Rev. at 535-39.

The present case involved numerous state police officials, all acting pursuant to a specific state statute and standard departmental procedure in surveilling petitioner's brother and maintaining a "Red Squad" file on him, noting petitioner's employment application in that file, communicating the contents of that file to other personnel officials in the department, and using that information to deny petitioner the promotion for which he was qualified. As the trial judge remarked, the state police officials who carried out the mandate of the "Red Squad" statute

> to a great extent . . . are not to be blamed for what went on. They were simply, if you will, carrying out orders. . . . [They] just simply blindly followed the law, and so they are at fault. The State is at fault for having passed it.

J.A. 72-73. The burden of liability should fall at the source of the deprivation: actions of the state of Michigan itself, at its highest executive and legislative levels.

III.

INCLUSION OF STATES, THEIR AGENCIES AND OFFICERS WITHIN THE DEFINITION OF "PERSON" IS FULLY CONSISTENT WITH FUNDAMENTAL PRINCIPLES OF FEDERALISM AND ESTABLISHED ELEVENTH AMENDMENT LAW

A. A construction of § 1983 that would subject states to suit in their own courts, though not in federal courts, is consistent with fundamental principles of federalism

It is in the nature of our federal system that federal courts have limitations on their jurisdiction that state courts do not, of which the Eleventh Amendment is just one example. Yet, the Michigan Supreme Court thought it "unlikely" that there would be a species of § 1983 claims that could be brought in state court, but over which the federal courts would not have jurisdiction because of the Eleventh Amendment. *See* Pet. App. 44a. In fact, such a result is both normal and common in our federal system.

For almost 200 years of our history, there have been many federal claims that could be brought in state, but not federal court. For the first 100 years—except for the short-lived "Law of the Midnight Judges," 2 Stat. 89 (Feb. 13, 1801), *repealed*, 2 Stat. 132 (Mar. 3, 1802)—lower federal courts had no general federal question jurisdiction at all. All such business was handled by the state courts with access to this Court ultimately in the event of an appeal. See § 25 of the Judiciary Act of 1789, 1 Stat. 73 (Sept. 24, 1789). *See generally* F. Frankfurter and J. Landis, *The Business of the Supreme Court* 24-30 (1927). Even after federal question jurisdiction was enacted in 1875, *see* 18 Stat. 470 (Mar. 3, 1875), an amount in controversy requirement was imposed for another 100 years until 1980,[20] with the result

20 In 1976, the amount in controversy was eliminated for federal question cases where a federal official was a defendant, P.L. 94-574, § 2, 90 Stat. 2721 (Oct. 21, 1976), and in 1980, it was eliminated for the balance of federal question cases.

that all federal question suits not meeting that requirement were proper in state court, but *not* in federal court.

In recent years, consistent with this history, the Court has frequently noted that certain federal claims can be brought only in state court. For example, in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 122 (1984) (*Pennhurst II*), this Court recognized that "[u]nder *Edelman v. Jordan* . . . a suit against state officials for retroactive monetary relief, whether based on federal or state law, must be brought in state court."

The interplay between this Court's decisions in *Maine v. Thiboutot*, *supra*, and *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979), presented another situation where certain kinds of § 1983 claims were required to be brought in state court because the federal courts lacked jurisdiction. In *Chapman*, this Court construed 28 U.S.C. § 1343(3), the jurisdictional counterpart to § 1983, to provide subject matter jurisdiction without regard to amount in controversy over § 1983 claims brought to enforce constitutional but not statutory rights. Yet, in *Maine v. Thiboutot*, this Court held that state violations of both federal constitutional and statutory rights were within the scope of § 1983. One argument against this construction of § 1983 was that it would be illogical for Congress to authorize a claim under § 1983 and yet not provide for federal jurisdiction. This Court observed:

> There is no inherent illogic in construing § 1983 more broadly than § 1343(3) was construed in *Chapman v. Houston Welfare Rights Organization* . . . . It would only mean that there are statutory rights which Congress has decided cannot be enforced in the federal courts unless 28 U.S.C. § 1331(a)'s $10,000 jurisdictional amount is satisfied.

448 U.S. at 8. *See also id.* at 11 n.12 (acknowledging that absent federal jurisdiction over federal claims, plaintiffs "would be forced to go to state courts").

In addition, state courts can grant relief from unconstitutional state tax laws free from the strictures of the Tax Injunc-

tion Act and federalism-based comity doctrines that normally bar a federal court from acting. *See Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981); *Pennhurst II*, 465 U.S. at 122. *See also* Note, *Section 1983 in State Court: A Remedy for Unconstitutional Taxation*, 95 Yale L. J. 414 (1985).

Outside the context of § 1983, the Eleventh Amendment abrogation cases provide examples of this Court's acceptance of the proposition that the state court can hear federal statutory claims against states that would be barred in federal court because of the Eleventh Amendment. In *Employees v. Missouri Dep't of Public Health*, 411 U.S. 279 (1973), the majority rejected arguments that lack of federal jurisdiction because of the Eleventh Amendment over claims against state defendants authorized by the Fair Labor Standards Act would create a "right without a remedy," by pointing out that the Act "[a]rguably . . . permits suit in the Missouri courts." *Id.* at 287. A more complete discussion of the question is found in the concurring opinion of Justices Marshall and Stewart:

> [B]y those amendments, Congress created in these employees a federal right to recover from the State compensation owing under the Act. While constitutional limitations upon the federal judicial power [set forth in the Eleventh Amendment] bar a federal court action by these employees to enforce their rights, the courts of the State nevertheless have an independent constitutional obligation to entertain employee actions to enforce those rights. *See Testa v. Katt*, 330 U.S. 386 (1947). *See also General Oil v. Crain*, 209 U.S. 211 (1908). For Missouri has courts of general jurisdiction competent to hear suits of this character, and the judges of those courts are co-equal partners with the members of the federal judiciary in the enforcement of federal law and the Federal Constitution, see *Martin v. Hunter's Lessee*, 1 Wheat. 304, 339-340 (1816).

411 U.S. at 298.

Justice Marshall's reasoning was applied by the majority of this Court in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). Holding that the federal Vocational Rehabilitation

Act established a cause of action against state defendants but did not abrogate California's Eleventh Amendment immunity, the Court disputed the claim that its interpretation would leave individuals whose statutory rights are violated by the state without any monetary remedy:

> This claim wholly misconceives our federal system. As Justice Marshall has noted, "the issue is not the general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before federal tribunals." *Employees v. Missouri Dept. of Public Health and Welfare*, *supra* at 293-294 (concurring in result) . . . It denigrates the judges who serve on the *state courts* to suggest that they will not enforce the supreme law of the land.

Id. at 240 n.2 (emphasis added).

Finally, only last Term in *Welch v. Texas Dept. of Highways*, 483 U.S. ____, 107 S.Ct. at 2941, a plurality of this Court held that Congress had not abrogated Texas' Eleventh Amendment immunity under the Jones Act, specifically separating that question from the issue of whether the Act authorized a cause of action against the state. *Id.* at 2947 n.6 (plurality opinion). As Justice White noted in his concurring opinion, "the Court . . . has already construed the Jones Act to extend remedies to such seamen [employed by the states]" in *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. at 282-283. *Id.* at 2957 (White, J., concurring). Of course, the continued existence of a remedy would have been important for only one reason: suit against the state in state court. *See* 46 U.S.C. § 688(a) (providing for suit against the employer in "the district in which the defendant employer resides or in which his principal office is located").[21]

The fact is that the greater exposure to liability in state court in this case is created not by petitioner's reading of § 1983, but by the Eleventh Amendment. Petitioner's reading of § 1983 is

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21 *See also* and *compare Lauf v. E.G. Shinner Co.*, 303 U.S. 323, 330 (1938) (federal court prohibited from entering labor injunction) with *Truax v. Corrigan*, 257 U.S. 312, 328-29 (1921) (labor injunction proper in state court).

consistent: Under § 1983, a plaintiff can make out a *cause of action* against the state in *both* state and federal court. The fact that § 1983 has greater force in state court results from the fact that the state has an Eleventh Amendment defense in federal court that is not available in state court.[22]

B. Holding that states, their agencies and officers acting in their official capacities are "persons" under § 1983 is not inconsistent with established Eleventh Amendment law

The definition of "person" under § 1983 raises the question of the scope of the cause of action established by the statute—that issue can and should be decided under normal rules of statutory construction. *See Monell*, 436 U.S. at 658. By contrast, the question of Eleventh Amendment abrogation is governed by a clear intent rule not imposed in any other context. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). Consequently, deciding that a state is a "person" under § 1983 in no way affects its Eleventh Amendment immunity or the validity of this Court's decision in *Quern v. Jordan*, *supra*.

In *Quern*, this Court was unwilling to presume that "Congress intended by the general language of § 1983 to override" Eleventh Amendment immunity, *id.* at 341, in the absence of "a history which focuse[d] directly on the question of state liability and which show[ed] that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States." *Id.* at 345. Though the concurring opinion in *Quern* viewed matters differently, the majority opinion carefully avoided deciding the separate question of whether the state or its agents were "persons" against whom a cause of action could be made out. An affirmative decision of that question here would not affect any aspect of Eleventh Amendment abrogation law.

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22 The Eleventh Amendment is not the only constitutional limitation on the jurisdiction of federal courts that is inapplicable to state courts. Article III of the Constitution restricts federal power to an actual case or controversy. By contrast, the Michigan Supreme Court has rendered advisory opinions even on matters of federal constitutional law. *See* 1963 Mich. Const. Art. 3, § 8.

In several other Eleventh Amendment cases, this Court has similarly recognized that Congress has authorized a cause of action against a class of defendants that includes states and yet found insufficient intent to abrogate Eleventh Amendment immunity, thereby implicitly relegating plaintiffs to a state court forum for relief against the states. *See Atascadero State Hospital*, 473 U.S. at 245-46; *Employees v. Missouri Dep't of Public Health and Welfare*, 411 U.S. at 279; *Welch v. Texas Dep't of Highways*, 483 U.S. ____, 107 S.Ct. at 2941. In those cases, this Court has separated the cause of action and immunity issues, observing that a "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Atascadero State Hospital*, 473 U.S. at 246.

IV.

THE MICHIGAN SUPREME COURT ERRED IN DECIDING THE "PERSON" ISSUE BY REFERENCE TO IRRELEVANT ELEVENTH AMENDMENT LAW

As argued above, the Michigan Supreme Court's decision is based upon several premises that are unsupportable. First, it improperly conflates the two separate issues of who is a "person" for cause of action purposes with abrogation of immunity under the Eleventh Amendment, finding that "Congress' failure to abrogate the states' Eleventh Amendment immunity indicated it never intended to subject states to suit as persons pursuant to § 1983." Pet. App. 42a. *See* Part IIIB, *supra*, and Cert. Pet. 11-14. Second, it improperly finds that the 42d Congress "intended to provide a [§ 1983] remedy in federal, not state courts." Pet. App. 44a. *See* Cert. Pet. 24-26. Third, it concludes that it would be "unlikely" to have a species of § 1983 claim that could be entertained in state court, but not in federal court despite the fact that such a result is a normal feature of our federal system. Pet. App. 44a-45a. *See* Part IIIA, *supra*.

However, even assuming *arguendo* that Eleventh Amendment law at the time § 1983 was passed should be taken into account in determining the meaning of the term "person," the version of Eleventh Amendment law that the Michigan Supreme Court assumed was in the mind of the 42d Congress is much too broad.

A. The 42d Congress would have believed that the Eleventh Amendment posed no obstacle to actions under § 1983 against states because Eleventh Amendment immunity had not yet been extended to federal question cases

The text of the Eleventh Amendment extends its protections only to suits "commenced or prosecuted against one of the United States by Citizens of another State or by Citizens of Subjects of any Foreign State." Though its provisions are now understood to extend not only to diversity cases, but to federal question cases as well, we owe that reading of the Amendment to *Hans v. Louisiana*, 134 U.S. 1 (1890)—decided almost 20 years after § 1 of the 1871 Civil Rights Act was debated. It is petitioner's position that the 42d Congress' silence about possible Eleventh Amendment problems with enforcement of § 1983 against states is not "amazing" (Pet. App. 45a), but rather is readily explainable by the fact that there was no basis for concluding that it applied at all to the federal law claims created by § 1 of the 1871 Act. *See Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (common law immunities not incorporated into § 1983 unless "well established" at time § 1983 was enacted). To say that Congress would have intended to "incorporate" Eleventh Amendment immunity into the "person" definition, the burden should be on respondents to show that it was "well established" in 1871 that Eleventh Amendment immunity would apply to § 1983 claims.

In extending the Eleventh Amendment to bar federal question suits, *Hans* was a major change from Eleventh Amendment law as it had existed up until then. The *Hans* Court effectively admitted this by its analytical approach. It failed to offer even *one* pre-1883 case to support its conclusions and could only portray its holding as "clearly established by the

decisions of this Court in several *recent* cases. *Louisiana v. Jumel*, 107 U.S. 711 [1883]; *Hagood v. Southern*, 117 U.S. 52 [1886]; *Ex parte Ayers*, 123 U.S. 443 [1887]." 134 U.S. at 10 (emphasis added). In default of any but recent precedent, the Court had to go back to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), and the debates on Article III to construct an argument from the ground up. What pre-1883 law there was on the Eleventh Amendment's applicability to federal questions cases, of course, were the observations of Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382-383 (1821), which are, as the *Hans* Court recognized, decidedly to the contrary. *Hans*, 134 U.S. at 20. *See also Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 857-858 (1824) and *Welch v. Texas Dept. of Highways*, 483 U.S. ____, 107 S.Ct. at 2964 (Brennan, J., dissenting).

One searches the major legal treatises of the day in vain for anything close to the broad reading of the Eleventh Amendment given by *Hans* or for anything suggesting that cases other than diversity suits are contemplated within its protections. *See e.g.*, 1 J. Kent, *Commentaries* 297 (11th ed. 1867); 2 J. Story, *Constitution of the United States* 462 (2d ed. 1851). Indeed, Story quotes Chief Justice Marshall's comment in *Osborn v. Bank of the United States*:

> The [Eleventh] amendment has its full effect, if the constitution be construed as it would have been construed, had the jurisdiction of the Court never been extended to suits brought against a State, by the citizens of another State, or by aliens.

9 Wheat. at 857-858. Moreover, Judge Conkling, in the 1864 edition of his widely-respected treatise on federal courts, observed that the Eleventh Amendment only applied to diversity cases and that "if the case arises under the constitution, &c., or if it is of admiralty or maritime jurisdiction, it matters not who may be the parties." A. Conkling, *A Treatise on the Organization, Jurisdiction and Practice of the Courts of the United States* 4 (4th ed. 1864). Professor Curtis told Harvard law students essentially the same thing as late as 1880. *See* B. Curtis,

Jurisdiction, Practice and Peculiar Jurisprudence of the Courts of the United States, 14, 18 (1880).[23]

There are good reasons for the paucity of pre-1883 citations to support the *Hans* Court's conclusion. One reason that it is highly unlikely that the *Hans* holding would be "well established" in Eleventh Amendment jurisprudence is found in the fact that there were few federal law claims brought against states between 1789 to 1871. Further, what experience there was with the few federal law claims that were brought disclosed no problem with the Eleventh Amendment. Most of those cases were cases like *Hans*: suits under the Contracts Clause, Art. I § 10, cl. 1.

Davis v. Gray, 83 U.S. (16 Wall.) 203 (1872), was a contemporary case indicative of the law of the Eleventh Amendment at the approximate time of the passage of § 1983 and a case that clearly would have been barred under post-*Hans* Eleventh Amendment law. In *Hans*, the plaintiff bondholders sought to recover accrued interest on bonds issued, but since repudiated by Louisiana, claiming violations of the Contracts Clause. They lost, of course. In *Davis*, a railroad sued the Governor of Texas under the Contracts Clause to recover vast tracts of land granted to it before the Civil War, but thereafter repudiated by the Texas Constitution of 1869. The Court in *Davis* decided in favor of the plaintiffs, rejecting the argument that the Eleventh Amendment barred the suit.[24] It held that the Texas laws repudiating the grant were "nullities" under the Contracts Clause, *id.* at 232, observing that, "[u]pon the grounds of jurispru-

23 Contemporary legal treatises should be given special weight because they are likely to have been the very sources of law that members of Congress had on their bookshelves and from which they gained their understanding of the law. Interestingly, the *Hans* Court observes that the reasons for its broad reading of state immunity are "fully discussed by writers on public law," 134 U.S. at 21, but fails to cite any.

24 *Compare Edelman v. Jordan*, 415 U.S. 615 (1974) ("equitable restitution" barred by Eleventh Amendment to the same extent as a traditional damages judgment). *See also Quern v. Jordan*, 440 U.S. at 345 n. 17, suggesting *Davis v. Gray* is inconsistent with *Edelman* and *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459 (1945) (suit for restitution of taxes barred by Eleventh Amendment).

dence of both the United States and of Texas," the suit was "well brought as regards the defendants." *Id.* at 222. It broadly observed:

> (1) A Circuit Court of the United States, in a proper case in equity, may enjoin a State officer from executing a State law *in conflict with the Constitution or a statute of the United States*, when such execution will violate the rights of the complainant.
>
> (2) Where the State is concerned, the State should be made a party, if it could be done. That it cannot be done is sufficient reason for the omission to do it, and *the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record.*

Id. at 220 (emphasis added).

It is significant that two dissenting justices argued that the suit was one against the Governor in his official capacity and therefore "in effect against the State of Texas" and that "the state is exempt from suit at the instance of private persons," 83 U.S. at 233 (Davis, J., dissenting). Indeed, the arguments of counsel for Texas, which were necessarily rejected by the Court, read like the holding in *Hans*. They argued that "[t]he reason for the adoption of the Eleventh Amendment was, that the states were not willing to be arraigned as defendants before the Federal courts at the instance of private persons, *be the cause of action what it may*," and urged that the Constitution "never did extend the judicial power to cases where a private individual was plaintiff and a state defendant." *See Hans*, 134 U.S. at 13, 15-16. Had anything like the broad immunity assumed by *Hans* been "well established" at the time, surely it would have garnered more than two justices' votes.[25]

25 For this proposition, counsel relied, *inter alia*, on *Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110 (1828), a case in which the Court held that a suit against the Governor of Georgia in his official capacity for the proceeds of the illegal seizure and sale of plaintiff's slaves was barred by the Eleventh Amendment.

B. Congress would have known that suits under § 1983 against states would be proper despite the Eleventh Amendment in state court where that immunity is inapplicable and in federal court when it is waived

Contrary to the view of the Michigan Supreme Court, defining states as "persons" under § 1983 would not have been regarded as a useless act by the 42d Congress even under the broadest reading of the Eleventh Amendment. First, the Eleventh Amendment does not apply in state courts, which have concurrent jurisdiction over § 1983 suits.[26] Second, the Eleventh Amendment does not apply in federal court when it has been waived.

There is no doubt that the 42d Congress would have known the concept of waiver of Eleventh Amendment immunity. Waiver is older than the Eleventh Amendment itself, being mentioned several times in *Chisholm v. Georgia*, *supra*. This should be no surprise since the whole concept of sovereign immunity which the Eleventh Amendment was meant to capture, at least with regard to diversity suits against states in federal court, is the notion that the sovereign cannot be sued without its consent. *Id.*; *Missouri v. Fiske*, 290 U.S. 18, 24 (1933).

Indeed, waiver would have been much easier under Eleventh Amendment law in 1871 than it is now. Entering a general appearance was one form of waiver. *Clark v. Barnard*, 108 U.S. 436, 447 (1883) (despite Eleventh Amendment, "in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction"). This, of course, explains why it was thought

26 Judge Spencer Roan of Virginia, an ardent advocate of states' rights, observed that the protection of the Eleventh Amendment "is confined to the Federal Courts, in exclusion of those of the states: for, if the State Courts were also inhibited from this jurisdiction, the parties [mentioned in the Eleventh Amendment] would be left without any redress whatever, when aggrieved by a state." *Hunter v. Virginia*, 18 Va. 11, 23, 4 Munf. 1, 34-35 (1814). This idea is carried forward in *General Oil v. Crain*, 209 U.S. 211 (1908) (state sovereign immunity cannot bar federal constitutional claim).

necessary in *Chisholm v. Georgia*, for the state of Georgia to refuse to appear to respond to the process issued by this Court in that case.[27] Other forms of waiver existed as well. In *Bank of the United States v. Planter's Bank*, 22 U.S. (9 Wheat.) 904 (1824), the Court held that a state-owned bank was subject to suit despite the Eleventh Amendment, because

> when the government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character . . . . The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, . . . and waives all the privileges of that character . . . .

22 U.S. at 907-908.[28] *See also Bank of Kentucky v. Wister*, 27 U.S. (2 Pet.) 318, 323 (1829) (bank wholly owned by state divested itself of sovereignty when it engaged in trade).[29]

In sum, nothing in the Eleventh Amendment deprives state courts of power to hear § 1983 cases against states or their officers. Indeed, the facts of this case demonstrate the importance

27 Modern Eleventh Amendment jurisprudence is to the contrary on this form of waiver. *See e.g.*, *Edelman v. Jordan*, 415 U.S. at 651 (where state appeared generally in trial court and did not raise Eleventh Amendment as a defense, nevertheless allowed to raise issue for the first time in the court of appeals).

28 *Compare Florida Nursing Home Ass'n v. Florida Dep't of Health*, 450 U.S. 147 (1981) (Florida statute giving department of state government power to "sue and be sued" is not a waiver of Eleventh Amendment protections). Later decisions of this Court have rejected any "proprietary" waiver argument. *See Ex Parte New York*, 256 U.S. 490, 500-03 (1921) (collision with state tugboat). *See also* and *compare Parden v. Terminal Ry.*, 377 U.S. 184 (1964) (state railway) *with Employees v. Dep't of Public Health and Welfare*, 411 U.S. at 284 (distinguishing *Parden* on grounds that activities were not "proprietary" because not run for profit).

29 Given the state of Eleventh Amendment law at the time of § 1983 enactment, the 42d Congress would surely have wanted to extend a damage remedy to black farmers denied a crop-planting loan by a state-owned bank that acted pursuant to a state statute that prohibited extensions of credit to blacks.

of maintaining the state courts as an available forum for the vindication of constitutional rights. Respondents' actions, undertaken pursuant to Michigan law, "lie[ ] so close to the core of the coverage intended by Congress that it is hard to conceive of . . . conduct that would come within [§ 1983] if this does not." *Griffin v. Breckenridge*, 403 U.S. 88, 103 (1971).

CONCLUSION

For all the above reasons, the decision of the Michigan Supreme Court should be reversed.

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APPENDIX

Michigan Public Acts 38, 39 and 40 of 1950 (Extra Session)

[No. 38.]

AN ACT to make criminal certain activities relating to the overthrowing or destroying of government by force, violence, sabotage, or terrorism; to prescribe the penalties therefor; to define duties of the attorney general and the state police; to prevent unlawful disclosures of information and to prescribe penalties therefor; and to repeal certain acts and parts of acts inconsistent with or contravening any provisions of this act.

The People of the State of Michigan enact:

752.311 Overthrowing or destroying government, preventing. [M.S.A. 28.243(1)]

Sec. 1. It is hereby declared that the governments of the United States and of this and other states of the United States are threatened by attempts to overthrow existing government by force and violence. In the light of the present world situation, it is deemed necessary to enact legislation preventing activity leading to such forceful overthrow. It is declared to be the purpose of this statute to maintain, preserve, and strengthen our established form of government and to prevent changes therein except by the procedures provided by our constitutions.

752.312 Certain acts deemed felony. [M.S.A. 28.243(2)]

Sec. 2. Whoever knowingly or wilfully advocates, aids, abets, advises, encourages or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or of this or any other state of the United States or any political subdivision thereof, by force, violence, sabotage, or terrorism or attempts or conspires to do so; or

Whoever, with intent to cause the overthrow or destruction of the government of the United States or of this or of any other state of the United States or any political subdivision thereof, commits any act of force, violence, sabotage, or terrorism, or attempts or conspires to do so; or

Whoever, with intent to cause the overthrow or destruction of the government of the United States, or this or any other state of the United States or any political subdivision thereof, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, encouraging, or teaching the duty, necessity, desirability or propriety of overthrowing or destroying any such government by force, violence, sabotage, or terrorism or attempts or conspires to do so; or

Whoever organizes, or helps or attempts to organize, or becomes or is a member of or affiliates with, any society, group, or assembly of persons which has as 1 of its purposes advocating, abetting, advising, encouraging, or teaching the duty, necessity, desirability or propriety of overthrowing or destroying the government of the United States or of this or any other state of the United States or any political subdivision thereof, by force, violence, sabotage, or terrorism, knowing such purpose;

Shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years.

752.313 Duties of attorney general and state police. [M.S.A. 28.243(3)]

Sec. 3. (a) The attorney general shall maintain complete records of all information received by him and may deliver to the prosecuting attorney of any county all information and evidence of matters which have come to his attention relating in any manner to the activities prohibited by section 2 of this act. The attorney general may cooperate with the prosecuting attorneys of the several counties or may intervene in any proceedings or may initiate proceedings in enforcing the provisions of this act. The expense incurred by any county of this state in the prosecution of any person charged with violation of this act shall, upon approval by the attorney general, be reimbursed to such county from the general fund of the state.

(b) The attorney general may cooperate with the attorney general of the United States, the department of justice of the United States, the federal bureau of investigation, and all other

police agencies which collect and exchange information and evidence relating to activities prohibited by this act.

(c) The state police shall collect information and evidence relating in any manner to activities prohibited by this act and may cooperate and exchange information relating thereto with any police agency and shall, at the request of the attorney general, report to him any such information and evidence so collected, necessary to any prosecution for the violation of the provisions of this act.

(d) Any person who discloses any information or evidence collected under authority of this act, except as authorized hereby or except as specifically authorized by the attorney general, shall be guilty of a felony.

752.314. Sections repealed; pending proceedings. [M.S.A. 28.243(4)]

Sec. 4. (a) Sections 1 and 2 of Act No. 168 of the Public Acts of 1935, being sections 752.301 and 752.302, respectively, of the Compiled Laws of 1948, are hereby repealed.

(b) All proceedings pending and all rights and liabilities existing, acquired or incurred, at the time this act takes effect, are hereby saved, and such proceedings may be consummated under and according to the law in force at the time such proceedings are or were commenced. It is the legislative intent that this act shall not be construed to alter, affect, or abate any pending prosecution, or prevent prosecution hereafter instituted under such repealed sections, chapters or acts for offenses committed prior to the effective date of this act; and all prosecutions pending at the effective date of this act, and all prosecutions instituted after the effective date of this act, for offenses committed prior to the effective date of this act, may be continued or instituted under and in accordance with the provisions of the law in force at the time of the commission of such offense.

752.315 Severing clause. [M.S.A. 28.243(5)]

Sec. 5. If any provision, section, clause, or phrase of this act, or the application thereof to any person or circumstance, is held

invalid, the remainder of the act, and the application of such provision, section, clause, or phrase to other persons or circumstances, shall not be affected thereby.

This act is ordered to take immediate effect.

Approved September 8, 1950.

[No.39.]

AN ACT to protect the welfare and safety of the people of the state of Michigan; to provide for civilian defense, the organization of the Michigan state troops, a security investigation division in the Michigan state police, and for additional personnel in the Michigan state police; to make an appropriation therefor; and to provide for the disbursement thereof.

The People of the State of Michigan enact:

30.101 Security investigation division, appropriation.

Sec. 1. There is hereby appropriated from the general fund of the state for the fiscal year ending June 30, 1951, to the Michigan state police the sum of $74,300.00 for a special division hereby created within the department of the Michigan state police to be known as the security investigation division, to investigate activities within the state that are not related to industrial reforms but are subversive of state or federal security, including but not by way of limitation acts of criminal syndicalism and sabotage, to obtain and compile information concerning such activities, and to cooperate with military authorities, and to cooperate with federal, state and local law enforcing and investigating agencies in the enforcement of federal and state laws relating thereto as follows:

Salaries and wages	$31,900.00
Contractual service, supplies and materials	16,410.00
Equipment	25,990.00
Total	$74,300.00

The files containing such information shall not be open for public inspection, nor shall such information contained therein be released: Provided, That the commissioner may furnish information to federal, state and local law enforcement agencies or to the responsible heads of any agency having charge of employment by the state whom he considers proper to receive the same when, in his opinion, it is necessary to carry out the objectives of this section. The commissioner of the Michigan state police is hereby authorized, in the creation and operation of such division, to appoint, employ, assign or retain such persons outside of or within the department of the Michigan state police as he may deem necessary, in carrying out the provisions of this act regarding subversive activities, at such compensation as he may determine. In his discretion, he may designate 1 or more of such employees to have the powers of any officer of the Michigan state police.

30.102. Michigan state troops, appropriation.

Sec. 2. There is hereby appropriated from the general fund of the state for preliminary planning and organization of the Michigan state troops the sum of $30,000.00. In case of the induction of a portion or all of the Michigan national guard into federal service, the unexpended balance of the appropriation made under the provisions of Act No. 32 of the Public Acts of the Extra Session of 1950 to the military establishment may be used for the organization, administration and training of the Michigan state troops to the extent of replacing the Michigan national guard units as may become necessary.

30.103. Civilian defense, appropriation.

Sec. 3. There is hereby appropriated from the general fund of the state for civilian defense the sum of $100,000.00 for the fiscal year ending June 30, 1951, disbursable under the provisions of Act No. 83 of the Public Acts of 1943, being sections 30.1 and 30.19, inclusive, of the Complied Laws of 1948.

30.104 Michigan state police; appropriation, purpose.

Sec. 4. There is hereby appropriated from the general fund of the state to the Michigan state police for the fiscal year ending June 30, 1951, the sum of $158,645.00, to provide additional personnel as follows:

Salaries and wages	$74,470.00
Contractual service, supplies and materials	59,760.00
Equipment	24,415.00
Total	$158,645.00

30.105 Federal funds, control and release.

Sec. 5. All moneys received from the federal government by the state of Michigan for the use of any department or agency for which an appropriation is made under the provisions of this act are hereby appropriated for the purposes for which granted. All moneys appropriated under the provisions of this act and all moneys received from the federal government for the use of any department or agency for which an appropriation is made under the provisions of this act shall be subject to the supervisory control of the state administrative board and shall be disbursed in accordance with the accounting laws of the state when released by the state administrative board. The state administrative board is hereby authorized to release said funds from time to time as needed.

This act is ordered to take immediate effect.

Approved September 8, 1950.

[No. 40.]

AN ACT to authorize the commissioner of the Michigan state police to create a subversive activities investigation division within the department of the Michigan state police, and to define the powers and duties of this division and of the commissioner and members of the Michigan state police and local police agencies in relation thereto; and to prescribe penalties for violations of the provisions of this act.

The People of the State of Michigan enact:

28.51 Subversive activities investigation division; establishment and appointment. [M.S.A. 4.448(1)]

Sec. 1. The commissioner of the Michigan state police is authorized to establish within the department of the Michigan state police a division to be known as the subversive activities investigation division, the personnel of which shall be appointed by the commissioner.

28.52 Same; duties. [M.S.A. 4.448(2)]

Sec. 2. The duties of the subversive activities investigation division shall be to investigate activities within the state that are subversive of state or federal government, to obtain and compile information concerning such activities, to cooperate with military authorities, and to cooperate with federal, state and local law enforcing and investigating agencies in the enforcement of federal and state laws relating thereto.

28.53 State police commissioner, powers. [M.S.A. 4.448(3)]

Sec. 3. The commissioner shall have power:

(a) To maintain in the subversive activities investigation division confidential files of information on activities that are subversive of government, and activities contrary to federal law as aforesaid. Such files shall not be open for public inspection, nor shall information contained therein be released: Provided, That the commissioner may furnish information to federal, state and local law enforcement agencies or to the responsible heads of any agency having charge of employment by the state whom he considers proper to receive the same when, in his opinion, it is necessary to carry out the objectives of this act.

(b) To call upon any sheriff or other police officer of any county, city, or township or village, for information on such activities and for aid and assistance, within the limits of their respective jurisdictions, in the performance of any duty imposed by this act and, upon being notified or called upon for such aid

and assistance, it shall be the duty of the officer concerned to comply with such order to the extent requested. Refusal or neglect to comply therewith shall be deemed nonfeasance in office and shall subject the officer so refusing or neglecting to removal from office.

(c) To appoint, employ, assign or retain such persons outside of or within the department of the Michigan state police as he may deem necessary, in carrying out the provisions of this act regarding subversive activities, at such compensation as he may determine and at his discretion to designate 1 or more of them to have the powers of an officer of the Michigan state police.

(d) To make such rules and regulations for the administration of the subversive activities investigation division as he shall deem necessary.

28.54 Revealing information deemed felony. [M.S.A. 4.448(4)]

Sec. 4. Unless otherwise directed by the commissioner of the Michigan state police, no information concerning the identity of personnel engaged in such subversive investigation work or the specific expenditure of moneys appropriated for the purpose of carrying out such investigations shall be revealed publicly or to any unauthorized person by any state agency, official or employee. Any person violating the provisions of this section shall be deemed guilty of a felony.

28.55 Assistance by officials and employees of state and local governmental units. [M.S.A. 4.448(5)]

Sec. 5. To effectuate the broad objectives of this act, officials and employees of state and local governmental units and agencies thereof are hereby authorized to assist officers of the Michigan state police in the investigation of subversive activities.

28.56 Subversive activities defined. [M.S.A. 4.448(6)]

Sec. 6. The term "subversive activities" as used in this act shall be construed to mean and include criminal syndicalism as it relates to political reform only and as it is otherwise defined under section 46 of Act No. 328 of the Public Acts of 1931, being section 750.46 of the Compiled Laws of 1948, or as the term "subversive activities" may be defined by other laws of the state of Michigan heretofore or hereafter enacted.

Approved September 8, 1950.

Michigan Compiled Laws of 1948

CHAPTER VIII
ANARCHY AND CRIMINAL SYNDICALISM

750.46 Definition.

Sec. 46. Criminal syndicalism defined—Criminal syndicalism is hereby defined as the doctrine which advocates crime, sabotage, violence or other unlawful methods of terrorism as a means of accomplishing industrial or political reform. The advocacy of such doctrine, whether by word of mouth or writing, is a felony punishable as provided in this chapter.

HISTORY: This section supersedes Sec. 1 of Act 255 of 1919, being C L 1929, 16559.

750.47 Advocacy of criminal syndicalism.

Sec. 47. Advocacy of criminal syndicalism—Any person who by word of mouth or writing, advocates or teaches the duty, necessity or propriety of crime, sabotage, violence or other unlawful methods of terrorism as a means of accomplishing industrial or political reform; or prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written matter in any form, containing or advocating, advising, or teaching the doctrine that industrial or political reform should be brought about by crime, sabotage, violence or other unlawful methods of terrorism; or openly, wilfully and deliberately justifies by word of mouth or writing, the commission or the attempt to commit crime, sabotage, violence or other unlawful methods of terrorism with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism; or organizes or helps to organize, or becomes a member of or voluntarily assembles with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism is guilty of a felony, punishable by imprisonment in the state prison not more than 10 years or by a fine of not more than 5,000 dollars.

HISTORY: This section supersedes Sec. 2 of Act 255 of 1919, being C L 1929, 16560.

750.48 Red flag, display.

Sec. 48. Display of red flag—Any person who shall display a red flag in any public assembly, parade or demonstration in this state is guilty of a felony.

The use of such a flag at any such assembly, parade or demonstration shall be considered as prima facie evidence of its use as an emblem of anarchy.

HISTORY: This section supersedes and merges Sec. 1 of Act 104 of 1919, being C L 1929, 16561; and Sec. 2 of Act 104 of 1919, being C L 1929, 16562.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
Consol. No. 74 023 934 AZ, 76 610 100 CZ

WALTER BENKERT, et. al.,

Plaintiffs,

—vs—

MICHIGAN STATE POLICE, et. al.,

Defendants.

INTERNATIONAL UNION et al.
WILLIAM MILLSTEIN et al.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

At a session of said Court held in the City-County Building, Detroit, Michigan on June 9, 1976.

PRESENT: HONORABLE: James Montante,
Circuit Judge

This matter having come on before the Court for the entering of a Partial Summary Judgment pursuant to GCR 117, and Attorney for Defendant Michigan State Police having filed an answer to Plaintiffs' motion, and the Court having reviewed same,

IT IS HEREBY ORDERED:

1. That certain Michigan statutes, namely P.A. 38, 1950 (Ex. Sess.), 752.311-315 MCLA; P.A. 39, 1950 (Ex. Sess.), 30.101-105 MCLA; P.A. 40, 1950 (Ex. Sess.), 28.51-56 MCLA; P.A. 328, 1931, 750.46-48 MCLA; P.A. 117, 1952, 752.321-332 MCLA, as amended by P.A. 37, 1953, 752.322-325 MCLA, are

unconstitutional on their face in violation of the Michigan and United States Constitutions, and are null, unenforceable, and void *ab initio*,

2. That Defendants, and those working in concert or cooperation with them, shall not further operate pursuant to, attempt to enforce, or otherwise gather, maintain or use information under authority of the above cited statutes,

3. That any unit or division of personnel within Defendants' authority which has or has had as all or part of its function the gathering, maintaining, and using of information pursuant to the above cited statutes be dismantled to the extent of those functions,

4. That the personnel assigned to administer, investigate, or act in any way under the authority of the above cited statutes be reassigned, and

5. That consideration by the Court of specific elements to be implemented in a plan for a monitoring system, including but not limited to selection and appointment of a monitor, delineation of her/his responsibilities and authority, notification of all those on whom information has been or is being gathered, maintained, or used pursuant to the above cited unconstitutional statutes, and provisions for Defendants' payment of reasonable costs incurred in implementing appropriate relief to those affected be adjourned until June 9, 1976 at 2:15 p.m.

/s/ JAMES MONTANTE
Circuit Judge

Approved as to form

/s/ PATRICK A. ASELTYNE
Patrick A. Aseltyne
for State Defendants

/s/ MAUREEN P. REILLY
Maureen P. Reilly
for City Defendants

/s/ ILLEGIBLE
for the UAW

A TRUE COPY
JAMES R. KILLEEN
CLERK

/s/ JAMES R. KILLEEN
DEPUTY CLERK

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM
No. 75 174499 AA

HUMAN RIGHTS PARTY,

Plaintiff,

v

DEPARTMENT OF STATE POLICE, et al,

Defendants.

AMENDED ORDER OF JUDGMENT

At a session of said Court held in the City of Lansing, County of Ingham, State of Michigan this 3rd day of February, 1976.

PRESENT: Honorable Thomas M. Brown
Circuit Court Judge

WHEREAS the parties in this matter having met and agreed to finally resolve this matter and also having entered into a formal stipulation agreement, and the Court having read and reviewed same,

IT IS HEREBY ORDERED:

1. That certain Michigan statutes, namely 1931 PA 328 and 1950 Ex Sess PA 38, 39 and 40, are violative of the United States Constitution and the Michigan Constitution (1963) and, therefore, unenforceable, null and void,

2. That the defendants shall not further enforce or otherwise administer 1931 PA 328 and 1950 Ex Sess PA 38, 39 and 40,

3. That all files, records, names, and other materials kept by Defendants pursuant to 1931 PA 328 and 1950 Ex Sess PA 38, 39 and 40 are hereby taken into the supervisory custody and

control of the Court and shall be destroyed under the direction and authority of the Court, but that said files, records, names, and materials shall not be destroyed before sixty (60) days from date of entry of this Order, namely March 16, 1976, so as to allow any person the opportunity, if they so desire, to petition the Court for permission to personally review their own individual file, if one exists, before destruction of said file,

4. That all persons assigned by Defendants to administer, investigate or act in any way under the authority and auspices of 1931 PA 328 and 1950 Ex Sess PA 38, 39 and 40 shall be reassigned to other duties within the Department,

5. That the Defendants shall contact all state agencies and other law enforcement agencies within the state of Michigan informing them of the Judgment in this matter, as entered, and simultaneously asking them to destroy any materials, information or data received by them from Defendant's officers assigned to administer 1931 PA 328 and 1950 Ex Sess PA 38, 39 and 40,

6. That this Order shall not pertain to the files, records or dossiers, if any, of the fourteen (14) named Plaintiffs in the matter of *Walter Benkert, et al* v *Michigan State Police, et al*, No. 74 023 934 AZ, now presently before Wayne County Circuit Judge James Montante.

IT IS FURTHER ORDERED that a petitioner mentioned in Paragraph Three (3) must be supported by sufficient factual allegations of injury, damage or need to know before judicial approval of disclosure will be given.

/s/ THOMAS L. BROWN
Thomas L. Brown
Circuit Judge

A TRUE COPY
[ILLEGIBLE]

APPROVED BY:

_____
Zolton Ferency
Attorney for Plaintiff

CHAPTER 64. COURT OF CLAIMS

600.6401. Short title

Sec. 6401. This chapter shall be known and may be cited as "the court of claims act".

600.6404. Creation of court; judges

Sec. 6404. The court of claims is created as a function of the circuit court for the thirtieth judicial circuit. A circuit judge of the thirtieth judicial circuit and any judge assigned into the thirtieth judicial circuit by the state court administrator may exercise the jurisdiction of the court of claims as provided by law.

(2)[1] In case of the disability or absence from the place of holding court of a circuit judge before whom while sitting as the judge of the court of claims a case has been tried or motion heard, another circuit judge designated to sit as the judge of the court of claims to[2] may continue, hear, determine, and sign all matters that his or her predecessor could have continued, heard, determine, and signed.

(3) In case a circuit judge designated to sit as the judge of the court of claims dies before signing a judgment and after filing a finding of fact or rendering an opinion upon proof submitted and argument of counsel disposing of all or part of the issues in the case involved, a successor as judge of the court of claims may proceed with that action in a manner consistent with the finding or opinion and the judge is given the same powers as if the finding of fact had been made or the opinion had been rendered by the successor judge.

[1] So in enrolled bill; there is no subsec. (1).
[2] So in enrolled bill.

600.6407. Sessions, location; court officer

Sec. 6407. The court shall hold at least 4 sessions in each year. Sessions of the court of claims may be held in the various

circuits in the state as the supreme court administrator may determine. If the hearing in a particular case is to be held at a place other than the city of Lansing, due notice shall be given to all interested persons. The sheriff of the county within which a case is heard, or 1 of his deputies, shall serve as court officer without additional compensation therefor. The department and management and budget shall furnish the court with suitable space and equipment in the city of Lansing.

600.6410. Clerks; fees; service of process

Sec. 6410. (1) The circuit judges of the thirtieth judicial circuit shall appoint or remove the clerk of the court of claims.

(2) For making copies of records, proceedings, and testimony and furnishing the same at the request of the claimant, or any other person, the clerk of the court of claims, or any reporter or recorder serving in the court of claims shall be entitled in addition to salary, to the same fees as are by law provided for court reporters or recorders in the circuit court. No charge shall be made against the state for services rendered for furnishing copies of records, proceedings, or testimony or other papers to the attorney general.

(3) Process issued by the court may be served by any member of the Michigan state police as well as any other officer or person authorized to serve process issued out of the circuit court.

Amended by P.A.1986, No. 308, § 1, Eff. Jan. 1, 1987.

600.6413. Ingham county reimbursement of costs; transfer of employees; seniority rights; retirement benefits

Sec. 6413. (1) The state shall reimburse the county of Ingham for the reasonable and actual costs incurred by that county for implementing jurisdictional duties in the circuit court imposed on that county by this chapter.

(2) The county of Ingham shall submit quarterly its itemized costs as described in this section to the state court administrative office. After determination by the state court administrator of the reasonableness of the amount to be paid, payment shall

be made pursuant to the accounting laws of this state. Determination of reasonableness by the state court administrator shall be conclusive.

(3) Full-time employees of the court of claims are transferred to the circuit court for the thirtieth judicial circuit. Seniority rights, annual leave, sick leave, longevity pay and retirement benefits to which employees of the court of claims are now entitled shall be preserved and the employees shall be continued in their positions in the court of claims in the thirtieth judicial circuit in a manner not inferior to their prior status. The obligation of the state for retirement benefits to employees of the court of claims for their accrued service in the court of claims shall not be transferred. The retirement system available to public employees in Ingham county shall provide retirement benefits to employees of the court of claims not inferior to those provided therefor under their prior status.

600.6416. Representation of state by attorney general or assistants

Sec. 6416. The attorney general, or his assistants, shall appear for and represent the interests of the state in all matters before the court.

600.6419. Jurisdiction; claims less than $1,000; counterclaims

Sec. 6419. (1) **Power and jurisdiction.** Except as provided in sections 6419a and 6440,[1] the jurisdiction of the court of claims, as conferred upon it by this chapter, shall be exclusive. The state administrative board is hereby vested with discretionary authority upon the advice of the attorney general, to hear, consider, determine, and allow any claim against the state in an amount less than $1,000.00. Any claim so allowed by the state administrative board shall be paid in the same manner as judgments are paid under section 6458[2] upon certification of the allowed claim by the secretary of the state administrative board to the clerk of the court of claims. The court has power and jurisdiction:

(a) To hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms, or agencies.

(b) To hear and determine any claims or demands, liquidated or unliquidated, ex contractu or ex delicto, which may be pleaded by way of counterclaim on the part of the state or any department, commission, board, institution, arm, or agency of the state against any claimant who may bring an action in the court of claims. Any claim of the state or of any department, commission, board, institution, arm, or agency of the state may be pleaded by way of counterclaim in any action brought against the state, or any other department, commission, board, institution, arm, or agency of the state.

(2) **Judgment; counterclaims; process.** The judgment entered by the court of claims upon any such claim, either against or in favor of the state or any department, commission, board, institution, arm, or agency of the state, upon becoming final shall be res adjudicata of that claim. Upon the trial of any cause in which any demand is made by the state or any department, commission, board, institution, arm, or agency of the state against the claimant either by way of setoff, recoupment, or cross declaration, the court shall hear and determine each claim or demand, and if the court finds a balance due from the claimant to the state, the court shall render judgment in favor of the state for the balance. Writs of execution or garnishment may issue upon the judgment the same as from the circuit court of this state. The judgment entered by the court of claims upon any claim, either for or against the claimant, shall be final unless appealed from as provided in this chapter.

(3) **Jurisdiction, workers' compensation, peace officers.** The court of claims shall not have jurisdiction of any claim for compensation under the provisions of either of the following:

(a) The workers' disability compensation act of 1969, Act No. 317 of the Public Acts of 1969, being sections 418.101 to 418.941 of the Michigan Compiled Laws.

(b) Act No. 329 of the Public Acts of 1937, as amended, being sections 419.101 to 419.104.

(4) **Jurisdiction, circuit courts, sales tax, declaratory or equitable relief, other statutory claims, review of unemployment claims.** This chapter shall not deprive the circuit court of this state of jurisdiction over actions brought by the taxpayer under the general sales tax act, Act No. 167 of the Public Acts of 1933, being sections 205.51 to 205.78 of the Michigan Compiled Laws, or proceedings for declaratory or equitable relief, or any other actions against state agencies based upon the statutes of this state in such case made and provided, which expressly confer jurisdiction thereof upon the circuit court, or proceedings to review findings as provided in the Michigan employment security act, Act No. 1 of the Public Acts of the Extra Session of 1936, being sections 421.1 to 421.72 of the Michigan Compiled Laws, or any other similar proceedings expressly authorized by the statutes of this state in such case made and provided.

Amended by P.A.1984, No. 212, § 1, Imd. Eff. July 9.

[1] Sections 600.6419a and 600.6440.

[2] Section 600.6458.

600.6419a. Court of claims; concurrent jurisdiction

Sec. 6419a. In addition to the powers and jurisdiction conferred upon the court of claims by section 6419,[1] the court of claims has concurrent jurisdiction of any demand for equitable relief and any demand for a declaratory judgment when ancillary to a claim filed pursuant to section 6419. The jurisdiction conferred by this section is not intended to be exclusive of the jurisdiction of the circuit court over demands for declaratory and equitable relief conferred by section 605.[2]

P.A.1961, No. 236, § 6419a, added by P.A.1984, No. 212, § 1, Imd. Eff. July 9, 1984.

[1] Section 600.6419.

[2] Section 600.605.

600.6420. Claims of $500 or less, delegation of state administrative board's authority to determine and allow claims; payment

Sec. 6420. The state administrative board may delegate the authority vested in it by section 6419(1)[1] for any claim of $500.00 or less for damage or loss of personal property by a claimant who is an employee of the state, to the head of the department in which the claimant was employed. Payment of the claim shall be made upon the written certificate of the department head that the loss or damage occurred in the course of the claimant's employment, without fault on the part of the claimant and that the claimant has not otherwise been reimbursed for the loss.

Amended by P.A.1984, No. 212, § 1, Imd. Eff. July 9.

[1] Section 600.6419(1).

600.6421. Joinder of cases; trial by judge

Sec. 6421. Cases in the court of claims may be joined for trial with cases arising out of the same transaction or series of transactions which are pending in any of the various trial courts of the state. A case in the court of claims shall be tried and determined by the judge even though the trial court action with which it may be joined is tried to a jury under the supervision of the same trial judge.

Amended by P.A.1984, No. 212, § 1, Imd. Eff. July 9.

600.6422. Practice and procedure

Sec. 6422. Practice and procedure in the court of claims shall be in accordance with the statutes and court rules prescribing the practice in the circuit courts of this state, except as herein otherwise provided. The supreme court shall have power to make special rules for said court.

600.6425. Depositions

Sec. 6425. The statutes and rules governing the taking of depositions in suits in the circuit courts of this state shall govern in the court of claims, except that it is not sufficient that the

witness resides more than 50 miles from the place of holding court to enable the deposition to be used for any purpose.

600.6428. Witnesses, power to compel attendance

Sec. 6428. The court of claims is hereby given the same power to subpoena witnesses and require the production of books, papers, records, documents and any other evidence and to punish for contempt as the circuit courts of this state now have or may hereafter have. The judge and clerk of said court may administer oaths and affirmations, and take acknowledgments of instruments in writing.

600.6431. Notice of intention to file claim, contents, time, verification, copies

Sec. 6431. (1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claims arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

(2) Such claim or notice shall designate any department, commission, board, institution, arm or agency of the state involved in connection with such claim, and a copy of such claim or notice shall be furnished to the clerk at the time of the filing of the original for transmittal to the attorney general and to each of the departments, commissions, boards, institutions, arms or agencies designated.

(3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

600.6434. Pleadings, service, copies

Sec. 6434. (1) Except as provided in this section, the pleadings shall conform to the rules for pleadings in the circuit courts.

(2) The complaint shall be verified. The pleadings of the state need not be verified.

(3) The complaint shall be served upon any department, commission, board, institution, arm, or agency of the state involved in the litigation, in the same manner as a complaint filed in the circuit court.

(4) With each paper, including the original complaint filed by the claimant, 1 copy of each shall be furnished to the clerk who shall immediately transmit the copy to the attorney general.

Amended by P.A.1984, No. 212, § 1, Imd. Eff. July 9.

600.6437. Judgment on stipulated facts

Sec. 6437. The court may order entry of judgment against the state or any of its departments, commissions, boards, institutions, arms or agencies based upon facts as stipulated by counsel after taking such proofs in support thereof as may be necessary to satisfy the court as to the accuracy of such facts and upon being satisfied that such judgment is in accordance with applicable law.

600.6440. Remedy in federal court as bar to jurisdiction

Sec. 6440. No claimant may be permitted to file claim in said court against the state nor any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts, but it is not necessary in the complaint filed to allege that claimant has no such adequate remedy, but that fact may be put in issue by the answer or motion filed by the state or the department, commission, board, institution, arm or agency thereof.

600.6443. Trial by court without jury; new trial

Sec. 6443. The case shall be heard by the judge without a jury. The court may grant a new trial upon the same terms and under the same conditions and for the same reasons as prevail in the case of the circuit courts of this state, in a case at law without a jury.

600.6446. Appeal to court of appeals; procedure

Sec. 6446. (1) Appeals shall lie from the court of claims to the court of appeals in all respects as if the court of claims was a circuit court.

(2) The procedure for the taking of appeals to the court of appeals from the court of claims shall be governed by the statutes and court rules governing the taking of appeals from a circuit court to the court of appeals in a case at law, without a jury.

(3) The clerk of the court of claims shall immediately furnish the parties to every action with a notice of entry of any final order or judgment, and the time within which an appeal as of right may be taken shall be governed by the Michigan court rules.

Amended by P.A.1984, No. 212, § 1, Imd. Eff. July 9.

600.6449. Costs, security for costs on appeal

Sec. 6449. (1) If the state shall put in issue the right of claimant to recover, the court may allow costs to the prevailing party from the time of the joining of the issue. The costs, however, shall include only witness fees and officers' fees for service of subpoenas actually paid, and attorney fees in the same amount as is provided for trial of cases in circuit court.

(2) Costs upon an appeal to the court of appeals shall be allowed in like amounts and for the same items as in a case appealed to the court of appeals from the circuit court.

(3) In the case of costs allowed against a claimant, judgment shall be entered thereon and writs of execution or garnishment may issue as from the circuit court.

(4) In the event of an appeal to the court of appeals by a claimant the judge may, upon motion by the attorney general, require security for costs from the claimant in connection with such an appeal.

Amended by P.A.1984, No. 212, § 1, Imd. Eff. July 9.

600.6452. Limitation of actions; rights of attorney general, petitions for administration of estate or appointment of guardian

Sec. 6452. (1) **Filing of claim.** Every claim against the state, cognizable by the court of claims, shall be forever barred unless the claim is filed with the clerk of the court or suit instituted thereon in federal court as authorized in section 6440,[1] within 3 years after the claim first accrues.

(2) **Limitation of actions.** Except as modified by this section, the provisions of RJA chapter 58,[2] relative to the limitation of actions, shall also be applicable to the limitation prescribed in this section.

(3) **Attorney general; petition for administration of estate of a deceased person.** The attorney general shall have the same right as a creditor under the provisions of the statutes of the state of Michigan in such case made and provided, to petition for the granting of letters of administration of the estate of any deceased person.

(4) **Petition for appointment of guardian of minor or person under disability.** The attorney general shall have the same right as a superintendent of the poor under the provisions of the statutes of the state of Michigan in such case made and provided, to petition for the appointment of a guardian of the estate of a minor or any other person under disability.

[1] Section 600.6440.
[2] Section 600.5801 et seq.

600.6455. Court of claims; judgment, interest

Sec. 6455. (1) Interest shall not be allowed upon any claim up to the date of the rendition of judgment by the court, unless

upon a contract expressly stipulating for the payment of interest. All judgments from the date of the rendition of the judgment shall carry interest at the rate of 12% per annum compounded annually, except that judgment upon a contract expressly providing for interest shall carry interest at the rate provided by the contract in which case provision to that effect shall be incorporated in the judgment entered. This subsection shall apply to any civil action based on tort filed on or after July 9, 1984 but before January 1, 1987 and any action pending before the court of claims on July 9, 1984. This subsection shall apply to any action, other than a civil action based on tort, filed on or after July 1, 1984 and any action pending before the court of claims on July 9, 1984.

(2) Except as otherwise provided in this subsection, for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action shall be calculated from the date of filing the complaint at a rate of interest which is equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, pursuant to this section.

(3) For complaints filed on or after October 1, 1986, interest shall not be allowed on future damages from the date of filing the complaint to the date of entry of the judgment.

(4) If a bona fide, reasonable written offer of settlement in a civil action based on tort is made by the party against whom the judgment is subsequently rendered, the court shall order that interest shall not be allowed beyond the date the written offer of settlement which is made and rejected by the plaintiff, and is filed with the court.

(5) Except as otherwise provided in subsection (3), if a bona fide, reasonable written offer of settlement in a civil action based on tort is not made by the party against whom the judgment is subsequently rendered, or is made and that offer is not filed with the court, the court shall order that interest be calculated from the date of filing the complaint to the date of satisfaction of the judgment.

(6) Except as otherwise provided in subsection (3), if a bona fide, reasonable written offer of settlement in a civil action based on tort is made by a plaintiff for whom the judgment is subsequently rendered and that offer is rejected and the offer is filed with the court, the court shall order that interest be calculated from the date of the rejection of the offer to the date of satisfaction of the judgment at a rate of interest equal to 2% plus the rate of interest computed under subsection (2).

(7) An offer made pursuant to this section which is not accepted within 21 days after the offer is made shall be considered rejected. A rejection, under this subsection or otherwise, does not preclude a later offer by either party.

(8) As used in this section:

(a) "Bona fide, reasonable written offer of settlement" means:

(i) With respect to an offer of settlement made by a defendant against whom judgment is subsequently rendered, an offer of settlement that is not less than 90% of the amount actually received by the plaintiff in the action through judgment.

(ii) With respect to an offer of settlement made by a plaintiff, an offer of settlement that is not more than 110% of the amount actually received by the plaintiff in the action through judgment.

(b) "Defendant" means a defendant, a counter-defendant, or a cross-defendant.

(c) "Party" means a plaintiff, or a defendant.

(d) "Plaintiff" means a plaintiff, a counter-plaintiff, or a cross-plaintiff.

Amended by P.A.1984, No. 212, § 1, Imd. Eff. July 9; P.A.1986, No. 178, § 1, Eff. Oct. 1.

600.6458. Judgment against state, payment

Sec. 6458. (1) In rendering any judgment against the state, or any department, commission, board, institution, arm or agency thereof, the court shall determine and specify in such

judgment the department, commission, board, institution, arm or agency from whose appropriation such judgment shall be paid.

(2) Upon any judgment against the state or any department, commission, board, institution, arm or agency thereof becoming final, or upon allowance of any claim by the state administrative board and upon certification thereof by the secretary of the state administrative board to the clerk of the court of claims, he, the clerk of the court shall certify to the auditor general the fact that such judgment was entered or that such claim was allowed and the same shall thereupon be paid from the unencumbered appropriation of the department, commission, board, institution, arm or agency: Provided, however, That the auditor general determines the funds therein are sufficient for such payment. In the event that funds are not available to pay any such judgment or allowed claim, the auditor general shall instruct the clerk of the court of claims to issue a voucher against an appropriation made by the legislature for the payment of judgment claims and allowed claims. In the event that funds are not available to pay any such judgment or allowed claim, such fact, together with the name of the claimant, date of judgment, date of allowance of claim by the state administrative board and amount thereof shall be reported to the legislature at its next session, and said judgment or allowed claim shall be paid as soon as moneys are available for such purpose. The clerk shall not certify any judgment to the auditor general until the period for appeal from such judgment shall have expired, unless written stipulation between the attorney general and the claimant or his attorney, waiving any right of appeal or new trial, is filed with the clerk of the court.

(3) The clerk shall approve vouchers under the direction of the court for the payment of the several judgments rendered by said court. All warrants issued in satisfaction of said judgments shall be transmitted to the clerk for distribution; and all warrants issued in satisfaction of claims allowed by the state administrative board shall be transmitted to the secretary of said board for distribution.

600.6461. Clerk's report to legislature, auditor general, budget director

Sec. 6461. (1) At the commencement of each session of the legislature and at such other times during the session as he may deem proper, the clerk of the court shall report to the legislature the claims upon which the court has finally acted, with a statement of the judgment rendered in each case.

(2) The clerk shall submit a detailed statement of the amount of each claim allowed by the court to the auditor general and the budget director.

600.6464. Judgment, discharge

Sec. 6464. The payment of any amount due as found by the judgment of the court of claims, including interest and costs, shall operate as a discharge of such judgment.

600.6467. State agencies to furnish information upon request

Sec. 6467. The court shall have power to call upon any officer, department, institution, board, arm or agency of the state government for any examination, information or papers pertinent to the issues involved in any case then pending before the court. No state employee shall receive any additional fees or compensation for rendering such services or appearing as a witness before the court upon behalf of the state.

600.6470. Fraud in connection with claim; forfeiture

Sec. 6470. Any person who corruptly practices, or attempts to practice, any fraud against the state of Michigan, in the proof, statement, establishment, or allowance of any claim or of any part of a claim, against the state, shall thereby forfeit the same to the state and it shall be the duty of the court of claims in such case to find specifically that such fraud was practiced, or attempted to be practiced, and thereupon to give judgment that such claim is forfeited to the state and that the claimant be forever barred from prosecuting the same.

600.6475. Actions involving negligent operation of motor vehicles or aircraft; defense of governmental function

Sec. 6475. In all actions brought in the court of claims against the state to recover damages resulting from the negligent operation by an officer, agent or employee of the state of a motor vehicle or an aircraft, other than a military aircraft, of which the state is owner, the fact that the state, in the ownership or operation of such motor vehicle or aircraft, was engaged in a governmental function shall not be a defense to such action. This act shall not be construed to impose upon the state a liability other or greater than the liability imposed by law upon other owners of motor vehicles or aircraft.

THE KU KLUX ACT

Commentary

On March 28, 1871, President Ulysses S. Grant sent Congress a special message urging the enactment of legislation to deal with "A condition of affairs. . . in some of the States of the Union rendering life and property insecure." The President was, of course, referring to the rising tide of terrorism in the southern states, led by the Ku Klux Klan (established 1866). The extent of such terrorism was fully documented in extensive Senate hearings. The type of testimony given in such hearings may be seen from the extracts contained in the speech of Representative William Stoughton [R., Mich.] early in the debate extracts that follow. Similar extracts were contained in the addresses of many Republicans, though, for our purposes, the Stoughton speech is enough to give the reader an illustrative idea of their flavor.

When the President's message was received, the House moved to take speedy action. Instead of the more elaborate measures that had previously been urged (notably a bill proposed by Congressman Benjamin Butler [R., Mass.] which had just failed to pass the House a year earlier), the House Judiciary Committee reported out a short bill, which contained the essential provisions of the law finally enacted as the so-called Ku Klux Act of 1871. The five sections of the original House bill were succinctly explained by Representative Samuel Shellabarger [R., Ohio] in introducing the measure in the lower chamber.

The Ku Klux Act, as introduced and ultimately passed, had two broad purposes: (1) to provide civil and criminal sanctions to deter infringements upon civil rights; and (2) to provide authority to the government to meet with force unlawful combinations and violence which interfered with civil rights or the execution of justice or federal law.

The first purpose was behind Section 1, providing for a lawsuit in a federal court by any person deprived of the rights given him by the Constitution or federal law or authority against any person who subjected him to such deprivation (such provision

still exists as 42 U.S.C. § 1983, and was derived from a comparable section of the 1866 Civil Rights Act); as well as Section 2 (which, in revised form, is now 42 U.S.C. § 1985), which provided for a criminal penalty against any person who committed a listed series of acts, ranging from conspiring to overthrow the government to deprivation or violation of constitutional rights, particularly those secured by the Fourteenth and Fifteenth Amendments.

The aim of providing the federal government with the authority needed to cope with mob violence was met by these two sections. The President had the power to use the armed forces to suppress any violence which deprived any class of people of their constitutional rights if the state authorities refused or were unable to protect such rights. He could also suspend habeas corpus. These provisions, in effect, gave the President the power to declare martial law in places where he deemed federal troops necessary to protect Negro rights, particularly the right to vote. The power thus granted was used by President Grant when, in October, 1871, he sent in troops to deal with the situation in nine South Carolina counties.

As was true of all of the post-Civil War civil rights legislation, the legislative proceedings leading to passage of the Ku Klux Act were essentially ratifications of what had already been decided upon by the Radical Republican leadership. This is not to say, however, that the debate itself did not go fully into the legal and other issues raised by the 1871 statute. As the Supreme Court has pointed out in *Collins v. Hardyman*, 341 U.S. 651 (1951), "The Act, popularly known as the Ku Klux Act, was passed by a partisan vote in a highly inflamed atmosphere. It was preceded by spirited debate which pointed out its grave character and susceptibility to abuse."

While Section 1 of the Ku Klux Act, by its terms, was limited in operation to persons who violated constitutional rights under color of state law, Section 2 imposed its criminal sanctions upon "any person" who so acted, regardless of whether his action was connected with action of the state in which he acted. This, of course, opened the door to opponents of the measure to contend that the law went beyond the constitutional language which, in the Fourteenth and Fifteenth Amendments, was limited to "state action" alone. The argument the other way proceeded upon the theory that state failure to act to protect constitutional rights furnished a sufficient basis for congressional action. In such view (best expressed in the remarks of Representative John Coburn [R., Ind.]) "state inaction" was elevated to the "state action" called for by the Fourteenth Amendment.

Congressional attacks were also made on the Ku Klux Act's provisions authorizing the President to use armed force and suspend habeas corpus. It was claimed that the Fourteenth Amendment provided no constitutional basis for conferring so far-reaching a power. Supporters of the bill relied here upon the notion that Congress could step in (even by so drastic a measure) when state failure to act resulted in a deprivation (even by otherwise private action) of constitutional rights.

* * *

The Ku Klux Act itself was passed by the House on April 6, 1871, by 118 to 91. It was passed by the Senate with amendments, on April 14, 45 to 19. The House refused to concur in the Senate amendments and a conference committee was appointed. The House refused to concur in the conference report, largely because it opposed a Senate amendment making cities and counties where violence occured liable in damages to those injured. The second conference committee watered down such provision to provide liability only for persons who knew of a conspiracy to violate civil rights and who could have prevented it. The second conference report was concurred in by both Houses on April 19, and the Ku Klux Act became law the next day.